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No. 91-469

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PARAGOULD CABLEVISION, INC.,
Petitioner,

v.

CITY OF PARAGOULD & THE PARAGOULD LIGHT AND WATER COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the conduct of a municipally-owned cable television system, as a market participant, is entirely immune from antitrust scrutiny.

2. Whether it is consistent with the Court's decision in *Town of Hallie v. City of Eau Claire*, 471 U.S. 32 (1985), to ascribe an intent to the Arkansas Legislature to permit cities to silence First Amendment speakers, privately-owned cable operators, through anticompetitive marketplace conduct where the legislature only passed a statute authorizing municipal entry.

3. Whether it is consistent with the Supreme Court's decisions on constitutional waivers to conclude without a trial that a municipality obtains a valid First Amendment waiver from a cable operator when the operator signs a franchise with the city.

PARTIES TO THE PROCEEDING

Petitioner, the plaintiff in the district court and appellant in the court of appeals, is Paragould Cablevision, Inc.* Respondents, the defendants in the district court and appellees in the court of appeals, are the City of Paragould, the Paragould Light and Water Commission, Charles Partlow, Don Perkey, Douglas J. Smith, Tim Wooldridge, Ben Branch, Phyllis Dees, Jay W. Dortch, Frank Gatlin, James Inness, George Cook, Jeptha Futrell, Jerry Jetton, William Brewer, and Mack Shotts.

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* Paragould Cablevision, Inc. is an indirect subsidiary of Cablevision Systems Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Paragould Cablevision, Inc. ("Cablevision") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-9a) is reported at 930 F.2d 1310. The opinion of the district court in this case (App. 10a-27a) is reported at 739 F. Supp. 1314.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1991 (App. 1a). A petition for rehearing was denied on June 18, 1991 (App. 28a). The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution states in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

The Fourteenth Amendment to the United States Constitution states in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act states in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several states, . . . shall be deemed guilty of a felony . . .

15 U.S.C. § 2 (1991).

The Local Government Antitrust Act of 1984 states in pertinent parts:

> No damages, interest on damages, costs, or attorney's fees may be recovered under section 15, 15a, or 15c of this title from any local government, or official or employee thereof acting in an official capacity.

15 U.S.C. § 35(a) (1991), and

> No damages, interest on damages, costs, or attorney's fees may be recovered under section 15, 15a, or 15c of this title in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

15 U.S.C. § 36(a) (1991).

Section 1 of Arkansas' Act 328 of 1987 states in pertinent parts:

> (a) Any first-class city, second-class city, and incorporated town may own, construct, acquire, purchase, maintain, and operate a television signal distribution system for the purpose of receiving, transmitting and distributing television impulses and television energy, including audio signals and transient visual images, to the inhabitants of the city or town and to the inhabitants of an area not to exceed two (2) miles outside the boundaries of the city or town.

Ark. Stat. Ann. § 14-199-601 (Supp. 1989), Addendum 25, and

> The city or town may erect, construct, operate, repair and maintain in, upon, along, over, across, through, and under its streets, alleys, highways, and public grounds, poles, cross-arms, cables, wires, guy-wires, stubs, anchors, towers, antennas, pipes, connections, and other appliances, fixtures, and equipment necessary, expedient, or useful in connection with a television signal system.

Ark. Stat. Ann. § 14-199-602 (Supp. 1989), Addendum 25.

STATEMENT

Paragould Cablevision, Inc. ("Cablevision") has been providing cable television services in Paragould, Arkansas ("the City") since 1963. Until just recently, Cablevision's system served over 6,300 subscribers. Cablevision's service features 50 channels of programming which include news and public affairs networks such as CNN and C-SPAN. Its current Franchise Agreement with the City runs from December 10, 1983 to December 9, 1993 with provisions for two five-year extensions. A rival cable television system operated by the City became operational in March, 1991. This case involves the question of whether the municipally-owned cable system may engage, as it is currently doing, in whatever anticompetitive, predatory, and coercive activities it desires, without the constraint of the antitrust laws, until it has succeeded in

running its competitor out of business. If the court of appeals' opinion stands, all antitrust claims against the municipal system would be barred, no matter how egregious the conduct.

Paragould's Entry into the Paragould Cable Television Market

In 1986, the voters of the City approved an ordinance authorizing the municipally-owned light and water utility, Paragould Light and Water Commission ("CLW"), to construct and operate a municipally-owned cable television system in Paragould as a direct competitor of Cablevision and its already established system. CLW controls and operates the utility poles to which both cable systems must attach in order to become operational.

In June 1988, the City adopted an ordinance authorizing CLW to acquire, construct and operate a cable television system and entered into a franchise agreement with CLW. On October 31, 1989, less than 35% of the City's registered voters, in an election vote, by a margin of 1,549 to 1,102, authorized the issuance of general obligation Capital Improvement Bonds by the City, of up to $3.2 million, for the purpose of financing the cost of acquiring, constructing and operating a cable television system.

Pursuant to that authorization, on January 22, 1990, the City enacted a bond ordinance authorizing the sale of general obligation bonds for the financing of the cable system. The bonds are secured by pledges of revenues derived from the system and, if necessary, by increases in taxes for all citizens in Paragould from a 2.1 mill ad valorem tax to 6.5 mill. In other words, the bonds are backed by the taxing powers and real estate taxes of the City.

From the outset, the City has flexed its taxing authority muscle in its efforts to persuade the voters to support a municipally-owned system, and ultimately to convert subscribers from Cablevision's system to its own. In par-

ticular, the City incorporated into its campaign advertising, the threat of a tax increase in the event that the City owned system was not able to garner at least 60% of Paragould's cable market. That point has been reiterated in interviews with City officials appearing in local newspapers. In fact, the publicly announced plans and financial projections of the municipal system are based upon assumptions that require CLW to capture the vast bulk of the Paragould cable television market.

Since beginning its operations in March, 1991 as City Cable, the City is rapidly advancing towards its goal of market dominance and monopolization. At the end of six months in operation, it had already signed over 2,000 customers. Since the city-owned system began, subscriptions for the Cablevision system have dropped to about 5000.

Cablevision's Lawsuit Against the City and CLW

In January, 1989, Cablevision filed a complaint against the City and CLW alleging certain antitrust violations and violations of Cablevision's rights under the First and Fourteenth Amendments. The crux of Cablevision's antitrust claim was that CLW was improperly utilizing its monopoly power in the electricity market to leverage itself into a monopoly position in the cable television market through cross-subsidization, predatory pricing, and other anticompetitive acts. Specifically, Cablevision asserted that "CLW's power to control the use of the [utility] poles, its monopoly power held in the provision of electric service, its new status as a direct competitor with Paragould Cablevision, and its announced intent to proceed with the construction and operation of a cable television system results in a dangerous probability of success in excluding competition from, and monopolizing, the relevant market" (Complaint ¶ 31). Cablevision further alleged that the "City's restriction on Paragould Cablevision's right to sell and transmit advertising on its cable system and its decision not to impose the same re-

striction on CLW impermissibly favors the rights of certain speakers over others in violation of the First and Fourteenth Amendments of the United States Constitution" (*Id.* ¶ 39).

The City and CLW moved to dismiss the Complaint in its entirety. The district court dismissed Cablevision's antitrust claims with prejudice, concluding that the general state statutes related to cable television, forever immunize CLW and the City from any and all anticompetitive acts, including those complained of by Cablevision. The district court also dismissed with prejudice Cablevision's constitutional claims, holding that the City's restriction on advertising by Cablevision did not amount to a regulation of speech.

On appeal, Cablevision argued that the district court's decision on the antitrust count was erroneous because it immunized the City and CLW from federal antitrust liability for all time and for all anticompetitive actions, including the most egregious predatory conduct. Cablevision urged that the district court painted much too broad a brush of the legislature's intent, since there was no evidence in the statutory language or legislative history that the legislature intended that municipalities be given carte blanche to eradicate competition from private competitors in the cable television market. Cablevision further contended that the district court misapplied the standard of review for motions to dismiss with respect to Cablevision's First and Fourteenth Amendment claims since it based its conclusion that speech was not implicated on an independent finding of fact.

The court of appeals affirmed the district court's decision, concluding that the statutory authority in Arkansas was broad enough to include the displacement and absolute elimination by municipalities who participate as cable operators in the cable television market of their private competitors from the market. To reach this conclusion, the court of appeals declared:

> Municipalities generally enjoy access to extant governmental infrastructure such as utility poles and rights of way. When a municipality, such as Paragould or its entity, the CLW, enters into the cable market, it necessarily will benefit from this access . . . . Because of the nature and extent of municipal operations, the displacement of competition necessarily results whenever the state authorizes municipalities to enter into an industry with monopolistic tendencies.

(App. 6a).

With respect to Cablevision's First Amendment claims, the court of appeals acknowledged that Cablevision's claims were valid. The court of appeals nevertheless dismissed those claims on an independent finding that Cablevision had waived its free speech rights when it signed the initial franchise agreement. Given that the waiver claim was a creature of the court's own making, neither party ever had the opportunity to present arguments on the issue. Notwithstanding that fact, the court concluded:

> By entering into the franchise agreement . . . Cablevision effectively bargained away some of its free speech rights. Cablevision could have bargained for an unqualified right to solicit and transmit advertisements. No law mandated otherwise. Cablevision simply failed to protect its commercial rights. Presumably Cablevision received consideration in return for this sacrifice, but apparently what was once considered a satisfactory bargain has turned into a sour deal. Regardless, Cablevision cannot now invoke the first amendment to recapture surrendered rights.[1]

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[1] (App. 8a). Cablevision's petition for rehearing asked the court of appeals to reverse the district court's dismissal of Cablevision's antitrust and First Amendment claims and to remand the case for the development of a record on all relevant issues, including the waiver defense, especially given that the latter point had never been factually addressed by either party. The petition for rehearing was denied on June 18, 1991.

REASONS FOR GRANTING THE PETITION

This case merits plenary review because it raises important and recurring questions regarding the contours of the antitrust exemption to municipally-owned commercial enterprises and regarding the standards for waivers of First Amendment rights in franchising contexts.

There are three reasons for granting the petition.

First, this Court has recently stated that when a state or municipality "acts as a commercial participant in a given market," antitrust "immunity does not necessarily obtain . . ." *City of Columbia v. Omni Outdoor Advertising, Inc.*, —— U.S. ——, 111 S. Ct. 1344, 1351 (1991). The court of appeals declined to factor this fundamental distinction into its analysis, characterizing it as "merely a suggestion" and "not a rule of law" (App. 4a). There is no basis to permit a full-fledged marketplace competitor, even if municipally-owned, to operate outside the rules that govern economic competition found in the Sherman Act.

Second, the court of appeals incorrectly applied the basic standard for municipal immunity set forth in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), and ascribed to the Arkansas Legislature, without foundation, an intent to permit cities to silence First Amendment speakers through anticompetitive means when all the legislature did was authorize municipal entry into cable.

Cablevision was permitted no discovery, nor was allowed to create any factual record in the district court. Yet the court of appeals' opinion was impermissibly grounded on a factual finding—that the cable industry has "monopolistic tendencies." For many reasons, that question cannot be decided without a record. Further, Cablevision submits that such a record would show the pattern of renegade behavior by the municipally-owned system beyond anything the legislature "authorized."

Third, the court of appeals clearly erred when, with no record before it, it held that Cablevision had waived its First Amendment right to engage in commercial speech when it signed its municipal franchise. The court of appeals never applied the standards of constitutional waivers developed by this Court. The thrust of the court of appeals' decision is that a local government, in exchange for a franchise grant, is free to extract the entirety of the First Amendment rights recognized by this Court in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986).

The effects of this decision go well beyond the facts and controversy in Paragould, Arkansas. There are an increasing number of communities (at last count approaching 100) with privately-owned cable systems where local governments are considering building rival municipal cable systems. If the court of appeals' decision is not reviewed, it becomes precedent to permit any municipality to run out a private cable speaker by whatever anticompetitive means it chooses, so long as it is authorized under state law to operate a system. If the court's decision stands, any municipality can extract a "waiver" of First Amendment rights in the franchising process, a task made easier by the threat of predatory municipal competition. A municipality, under the logic of the court of appeals' decision, could require a cable operator in the franchising process to forego its First Amendment status recognized by the Supreme Court, including *inter alia*, its press role of reporting on municipal governmental affairs.

The end result of such a decision will be communities with no local speaker, but only a government-owned electronic press. This is a particularly chilling result in the thousands of communities like Paragould with no truly local over-the-air broadcast station licensed to the community.

I. A MUNICIPALLY-OWNED COMMERCIAL PARTICIPANT'S MARKETPLACE CONDUCT SHOULD BE SUBJECT TO THE ANTITRUST LAWS.

This case presents the situation of whether the conduct of a municipally-owned market participant should be subject to the same rules of competitive behavior as all of its competitors. Cablevision's antitrust complaint challenges not the regulatory acts of a government, but marketplace conduct of a commercial enterprise providing a nonessential service unrelated to public health and safety. The court of appeals decided that these factors did not affect the question of antitrust immunity under this Court's decisions. That conclusion is incorrect and should be set aside by this Court.

Municipalities, unlike states, are not automatically exempt from the federal antitrust laws. *See, e.g., Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985); *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 49-50 (1982). Anticompetitive activity by a municipality is only excused from antitrust liability when the challenged conduct is "pursuant to state policy to displace competition with regulation or monopoly public service." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978) (plurality opinion). To qualify as exempt, the "state policy" relied upon must derive from a "clearly articulated and affirmatively expressed state policy." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 44 (1985).

This Court has emphasized that courts must take a discerning approach to assess municipal antitrust immunity. The Court has therefore indicated that while a municipality need not point to a specific, detailed legislative authorization to assert a successful immunity defense, the determination of whether such an exemption applies is not a "purely formalistic inquiry; the State may not validate a municipality's anticompetitive conduct simply by declaring

it to be lawful." *Town of Hallie*, 471 U.S. at 39. Rather, it must be apparent "that the legislature contemplated the kind of action complained of" when it granted authority to operate in a particular area. *See id.* at 44, *citing City of Lafayette*, 435 U.S. at 415.

Hence, for example, in *Community Communications Company, Inc. v. City of Boulder*, 455 U.S. 40 (1982), the Court found that Colorado's Home Rule Amendment to its Constitution, conferring on municipal governments general authority to govern local affairs, did not constitute a "clear articulation" of state policy to authorize anticompetitive conduct with respect to the regulation of cable television. In so holding, the Court noted that "the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive." *Id.* at 55 (emphasis in original).

Congress has similarly recognized the importance of subjecting municipalities to antitrust scrutiny. In passing the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (1991), which immunizes municipalities from treble damage suits, Congress declined to exempt local governments altogether from the antitrust laws. It did so in large part because of its recognition that local governments involved in business enterprises may engage in anticompetitive activity which fails to serve any legitimate public purpose.[2]

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[2] *See* H.R. Rep. No. 965, 98th Cong., 2d Sess., at 12-13 (1984) (noting that any legislative solution should weigh the chilling effect of potential or actual antitrust litigation on local governments and their officials against the need to preserve some right of redress for private persons harmed by anticompetitive conduct); *Id.* at 25 (statement of Rep. Jack Brooks) (noting that the bill, by providing for injunctive relief, recognizes that there is a role for the antitrust regulation of local governments to ensure proper competition in local markets); 130 Cong. Rec. H8474 (daily ed. Aug. 6, 1984) (statement of Rep. Peter Rodino) (observing that local governments

In last term's *City of Columbia* decision, the Court found that a city's zoning restrictions regarding billboard construction were immune from federal antitrust liability under *Parker v. Brown*, 317 U.S. 341 (1943). At issue were official decisions of governmental bodies. In rejecting the Fourth Circuit's holding, based upon language in *Parker*, that antitrust immunity would not apply where the official decision represented an act pursuant to a conspiracy with a private party, this Court indicated that the state action immunity derived from the basic national commitment to federalism and that therefore ". . . the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." 111 S. Ct. at 1351.

In contrast, however, an entirely different situation is presented when the action under scrutiny is not governmental conduct by a sovereign, but commercial conduct by a government-owned entity. As the Court pointed out twice in *City of Columbia*:

> [antitrust] immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market.

Id.

* * * *

> We reiterate that, with the possible market participant exception, *any* action that qualifies as state action is '*ipso facto* . . . exempt from the operation of the antitrust laws.'

111 S.Ct. at 1353 (citations omitted).

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are increasingly engaged in commercial and business activity and that they are in a position to undercut the national policy favoring competition even when such action serves no legitimate government purpose). *See also* P. Areeda & H. Hovenkamp, Antitrust Law, ¶ 212.2, at 124 (Supp. 1989) (antitrust scrutiny of municipal actions is justified where damages are unavailable).

The court of appeals had the teachings of *City of Columbia* before it when it reached the instant decision. Instead of applying those insights to the purpose and limits of the state action immunity, the court of appeals pronounced them as "dicta" and "suggestions" and declined to utilize them until they are transformed into a rule of law (App. 3a-4a.).

The court of appeals' failure to recognize the distinctions identified in *City of Columbia* was wrong. The court then compounded its mistake in its wooden application of the basic standards found in *Town of Hallie.*

The touchstone of the antitrust laws is consumer welfare. *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Consumer welfare may be as adversely affected by predatory and anticompetitive conduct of a government-owned enterprise as by one owned by an individual or public shareholders. No principle of federalism is undermined, moreover, by requiring government-owned market participants to comply with the same competitive safeguards as its competitors.

Such a conclusion is consistent with the consensus of courts facing the issue that nonprofit entities in general are not entitled to antitrust immunity, *e.g.*, *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 100 n.22 (1984), and that nonprofit entities are equally prone to anticompetitive behavior as profit-making enterprises. *See, e.g., FTC v. University Health, Inc.*, 1991-1 Trade Cas. ¶ 69,424 (11th Cir. 1991); *United States v. Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir.) *cert. denied*, 111 S. Ct. 295 (1990); *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1390 (7th Cir. 1986).

As was recognized in *City of Lafayette*:

> In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws . . . we are especially

> unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.

435 U.S. at 412-13.

The Court further emphasized that

> [i]f municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.

Id. at 408.

This Court should expound as a rule of law that municipal enterprises that are acting solely as a market participant enjoy no antitrust immunity, reverse the court of appeals, and reinstate Cablevision's complaint.

II. IN AUTHORIZING MUNICIPALITIES TO ENTER THE CABLE MARKET THE ARKANSAS LEGISLATURE DID NOT AUTHORIZE IT TO ENGAGE IN CONDUCT VIOLATIVE OF THE SHERMAN ACT.

Cablevision does not contend that the decision of the City and CLW to enter the cable television business violates the antitrust laws. Cablevision does contend that the methods chosen, and the intent of the City and CLW to destroy any competition in the cable television business in Paragould, states an antitrust claim because the conduct Cablevision challenges is *not* a necessary and reasonable consequence of defendants engaging in the cable television business, the "authorized activity" by the State of Arkansas. The court of appeals hinged its decision on a factual finding on the nature of the industry in question, a finding which we vigorously dispute both procedurally because of the lack of any record and on the merits. Moreover, in deciding that the City's conduct was exempt, the court of appeals also completely failed to consider that First Amendment speakers are at issue and, without

foundation, ascribed to the Arkansas Legislature an intent to permit cities to silence such speakers through anticompetitive means.

A. The Relevant Statutes Do Not Contemplate the Anticompetitive Conduct Complained of by Cablevision.

In reaching its conclusion, the court of appeals relied on two Arkansas statutory schemes relating to cable television. Section 1 of Act 328 of 1987, Ark Stat. Ann. § 14-199-601 (Supp. 1989), Addendum 25, expressly authorizes the City of Paragould to own, construct, and operate a cable television system.[3] Act 871 of 1985, Ark. Stat. Ann. § 14-164-301 *et seq.* (1987 & Supp. 1989), Addendum 21-24, generally authorizes municipalities to issue general obligation Capital Improvement Bonds to finance the acquisition, construction, and operation of cable television systems, Ark. Stat. Ann. § 14-164-303, subject to the passage of an authorizing ordinance and approval by the electorate. Ark. Stat. Ann. §§ 14-164-303, 309, Addendum 21-24.

There is no reason to believe that Arkansas, in authorizing municipalities to construct and operate cable systems, intended to quell all competition or permit municipal

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[3] The statute provides that:

> (a) Any first-class city, second-class city, and incorporated town may own, construct, acquire, purchase, maintain, and operate a television signal distribution system for the purpose of receiving, transmitting and distributing television impulses and television energy, including audio signals and transient visual images, to the inhabitants of the city or town and to the inhabitants of an area not to exceed two (2) miles outside the boundaries of the city or town.

Ark. Stat. Ann. § 14-199-602 (Supp. 1989), Addendum 25, states that:

> The city or town may erect, construct, operate, repair and maintain in, upon, along, over, across, through, and under its streets, alleys, highways, and public grounds, poles, cross-arms, cables, wires, guy-wires, stubs, anchors, towers, antennas, pipes,

systems to engage in anticompetitive acts. The statute at issue in this case *does not allow* the City *to place limitations* on competitors; it merely allows it to *become* a competitor. Furthermore, it is noteworthy that in the same 1987 session that the Arkansas legislature passed legislation that permitted municipalities to operate a cable system, it failed to pass another bill that would have authorized cities to exercise the power of eminent domain for the purpose of acquiring cable television systems in order to convert them to publicly owned and operated systems."[4] If the latter legislation had passed, it may have been appropriate to ascribe to the Arkansas legislature the expectation that private competition was to be quashed. The fact that it did not, however, suggests that the court of appeals is mistaken and has read far too much into Act 328, which simply authorizes market entry by municipalities, not municipal monopolies.

B. The Monopoly Leveraging Conduct Alleged by Cablevision Was Not Contemplated By These Statutes.

Cablevision's complaint alleged that the City and CLW had and were planning to engage in monopoly leveraging conduct. Monopoly leveraging has been widely recognized as a valid antitrust claim.[5]

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connections, and other appliances, fixtures, and equipment necessary, expedient, or useful in connection with a television signal system.

[4] Senate Bill 434, State of Arkansas, 76th General Assembly, Regular Session 1987, By: Senator Malone. Senator Malone also introduced Act 328.

[5] *See, e.g., Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc.*, 854 F.2d 135 (6th Cir. 1988), *cert. dismissed*, 490 U.S. 1087, 109 S. Ct. 2461 (1989). *See also Directory Sales Management Corp. v. Ohio Bell Telephone Co.*, 833 F.2d 606 (6th Cir. 1987); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *SmithKLINE Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir. 1978), *cert. denied*, 439 U.S. 838 (1978).

Cablevision alleged, among other things, that the City and CLW were using their leveraging power to drive it out of business.[6] Under the present scheme, the City has a strong incentive to use its leveraging power for this purpose, in light of the fact that unless prospective subscribers support the city-owned cable system, their property taxes will triple from 2.1 mill to 6.5.[7]

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[6] Cablevision's belief is soundly based. Even though the costs of operating the cable system should be borne by the system and its subscribers, we believe that CLW is cross-subsidizing its cable system. Despite CLW's assertion in the court of appeals that cross-subsidization will not occur, it is widely acknowledged that there is no facile solution—cross-subsidization is easy to accomplish and difficult both to detect and monitor. *See, e.g., United States v. Western Electric Co.*, 673 F. Supp. 525, 573 (D.D.C. 1987), *aff'd* [*rev'd*] *on other grounds*, 900 F.2d 283 (D.C. Cir. 1990) (noting that "cross-subsidization is easy to achieve by firms engaged in both regulated and unregulated business but difficult to detect"). The federal ban on telephone company ownership of cable services within the company's service area, *See* 47 U.S.C. § 533(b), 47 C.F.R. §§ 63.54-63.58, reflects an understanding that telephone companies have the means and the incentive to engage in anticompetitive conduct and the potential to cross-subsidize. *See* Final Report and Order, *In the Matter of Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated CATV Systems*, 21 FCC 2d 307, 324-330 (1970), *aff'd sub nom. General Telephone Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971). In this instance, CLW personnel and equipment are being used by the City cable company, and, among other things, we believe that CLW employees not otherwise in cable have been dragooned into taking the cable service themselves and selling it to others by threats of reductions of their employee benefits. The court of appeals' decision, however, immunizes this otherwise improper conduct from the antitrust laws and would allow such conduct to occur unchecked, since there is no state-level supervision of municipally-owned utilities. Ark. Code Ann. § 23-4-201 (1989).

[7] Cablevision believes that if it were permitted to develop a record in this case, it could demonstrate that CLW is currently engaging in cross-subsidization and below cost pricing, and is expressly attempting to utilize its monopoly control over electric service to coerce subscriptions to its cable service. The city has a strong incentive to cross-subsidize in order to avoid raising property taxes.

Nowhere in the cited statutes is there any express authorization to exclude private competition in local cable television markets through this kind of monopoly leveraging or predatory conduct.[8] As the plurality stated in *City of Lafayette*, "even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." 435 U.S. at 417; *see Otter Tail Power Co. v. United States*, 410 U.S. 366, 377-82, 390-91 & n.7 (1973) (Stewart, J., concurring in part and dissenting in part).[9]

The best that can be said about the court of appeals decision is that it is based upon an improper finding that "the displacement of competition necessarily results whenever the state authorizes municipalities to enter into an industry with monopolistic tendencies." (App. 6a.). *First*, there is no record in this case to support such an assumption—there is no record in this case at all. To the con-

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[8] *See Parks v. Watson*, 716 F.2d 646, 663-64 (9th Cir. 1983) (finding no immunity where nothing in the statute authorizing public ownership of geothermal resources allowed the court to infer that any authorization by the state to displace competition with city-run geothermal districts may also have included authorization for the city to undertake anticompetitive actions).

[9] It is hard to believe that the Arkansas legislature contemplated that City Cable representatives would

—take the municipal voting list to repeatedly call those who voted in the authorization election to insist that they were "obligated" to subscribe to the City Cable system;

—inform retired municipal employees that pension payments might be "lost" if they do not subscribe to the City Cable system;

—imply to residents of a public senior citizen home that they have an "obligation" to subscribe to the City Cable system; and

—tell churchgoers who utilize the adjacent CLW parking lot on Sunday that such use requires them to subscribe to the City Cable system.

All of this, Cablevision believes, has occurred in Paragould.

trary, Cablevision wants to compete and believes it can compete if the municipal system is subject to basic competitive rules.[10] Certainly the court of appeals had no basis to make what is a factual finding to that effect. *Second*, in contrast to the carte blanche accorded municipalities by the court of appeals, Congress has directed in the Cable Communications Policy Act of 1984 that cable systems are entitled to significant protections against the unfair and arbitrary renewal actions previously practiced by franchising authorities.[11] Local political officials can evade these safeguards by threatening to overbuild or by overbuilding and thus accomplishing indirectly what federal law prohibits them from doing directly. *Third*, the Federal Communications Commission, charged with supervisory policy authority over cable television, has articulated a strong policy preference for the grant of more franchises for additional cable speakers, rather than monopoly speakers, whether private or governmental.[12]

In light of those factors, the Court should reject the linchpin of the court of appeals' decision and instead hold that legislation authorizing entry, standing alone, does not constitute state policy to displace competition. At the

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[10] From Cablevision's vantage point, the municipal system is prepared to engage in all types of outlaw behavior until brought to task by third parties. In building its system, CLW engaged in improper and dangerous construction techniques, causing physical damage to the plant, ignoring Cablevision's protests, until the local telephone company also protested. It engaged in improper installation processes until the FCC intervened. But under the court of appeals' decision, there will be no constable on the beat protecting against anticompetitive conduct.

[11] *See* Cable Communications Policy Act of 1984, 47 U.S.C. § 546 (1991). *See also* H.R. Rep. No. 934, 98th Cong., 2d Sess., at 72 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News, 4655, 4709.

[12] *See In the Matter of Competition, Rate Deregulation and the Commission's Policies to the Provision of Cable Television Service*, 5 FCC Rcd 4962 (July 31, 1990).

very least, a ruling that an entry statute constitutes state authorization requires a record that competition in the market was infeasible, and this case requires reversal for the development and trial of this issue. *See Preferred, supra.*

C. The Court of Appeals' Conclusion Regarding the Legislative Intent is Particularly Unfounded in Light of the First Amendment Status of Cable Operators.

The court of appeals concluded that conduct otherwise violative of the antitrust laws, monopoly leveraging, was a "necessary and reasonable consequence of engaging in the authorized activity." In so doing, the Court ignored an important, distinguishing element about the "market" in question—that it is comprised of First Amendment speakers. There is no dispute that cable operators are First Amendment speakers because they originate, select and disseminate news, information and entertainment. *See, e.g., Leathers v. Medlock*, —— U.S. ——, 111 S. Ct. 1438 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

Certainly, a bill enacted by the Arkansas Legislature to outlaw all existing cable operators or to replace them with government speakers would raise grave First Amendment concerns. Yet the crux of the court of appeals' opinion is that the Arkansas Legislature foresaw and authorized the exact same result when it passed legislation allowing municipalities to operate cable systems. There is no legislative history or record that supports that position.

If any conclusion can be drawn from the record, it is that the Arkansas Legislature meant to promote municipal entry, and hence *add* competition, and to ensure the introduction of cable into rural communities that did not have service, not that it meant to *displace* competition,

and certainly not that it meant to authorize municipalities to destroy private First Amendment speakers through anticompetitive and predatory marketplace conduct. That is exactly what is happening in Paragould. Armed with its antitrust exemption, the City is currently utilizing, we believe, all manner of predatory and anticompetitive conduct to attempt to drive Cablevision out of business. And unless this decision is revisited and altered, dozens of other municipal governments may well do the same.

Courts generally will attempt to avoid constructions of statutes that raise significant constitutional questions. *See, e.g., United States v. Rumely*, 345 U.S. 41, 45 (1953); *Crowell v. Benson*, 285 U.S. 22 (1932). In this case, there is an interpretation of the Arkansas legislation that is more consonant with the First Amendment status of cable operators—*i.e.*, the legislation authorizes municipal entry, but does not authorize anticompetitive municipal acts, such as predation or leveraging.

III. THE COURT FAILED TO APPLY RELEVANT SUPREME COURT PRECEDENT IN ANALYZING THE FIRST AMENDMENT WAIVER CLAIMS.

In light of the presumption established by the Supreme Court against waivers of constitutional rights and the constitutional standard that such waivers must be voluntary, knowing, and intelligent, the court of appeals' dismissal of Cablevision's First Amendment claims was erroneous. The court of appeals' decision is completely devoid of any record analysis whatsoever of whether the alleged waiver by Cablevision through the franchise agreement was given knowingly and voluntarily. The thrust of the Court's decision is that a local government, in exchange for a franchise grant, is free to extract the entirety of the First Amendment rights recognized by the Supreme Court.[13]

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[13] *See, e.g., Leathers, supra; Preferred, supra.* Under the federal 1984 Cable Act, a cable system cannot operate without a franchise. 47 U.S.C. § 541(b) (1991).

The court recognized that Cablevision had expressed a valid First Amendment claim because it had to solicit the City's permission to engage in commercial speech, a position contrary to the contentions of the City and the district court. However, according to the court of appeals, "Cablevision effectively bargained away some of its free speech rights" when it entered into the agreement and further "simply failed to protect its commercial rights." (App. 8a).

Cablevision submits that the court jumped much too quickly to the conclusion that a valid waiver of First Amendment rights had occurred. It is well settled that for a constitutional waiver to be effective, it must be voluntary, knowing and intelligent, *Edwards v. Arizona*, 451 U.S. 477, 483-85 (1981); *Faretta v. California*, 422 U.S. 806, 835 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972); *D.H. Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 185 (1972); *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); and that there is a presumption against the waiver of constitutional rights. *Brookhart*, 384 U.S. at 4. Furthermore, such waivers must be established by "clear" and "compelling" evidence. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967). In finding a waiver here, the court never engaged in the analysis mandated by this precedent.

Moreover, the determination of whether there has been an intelligent waiver of a constitutional right depends on "particular facts and circumstances surrounding [each] case, including the background, experience and conduct of [the person or entity charged with the waiver]." *Johnson v. Zerbst*, 304 U.S. at 464. Since the complaint was dismissed prior to discovery and without a hearing, no record exists that permits such an analysis.

If the court of appeals was assuming that signing a franchise agreement must always constitute a constitutional waiver, that assumption, we contend, is erroneous.

The Seventh Circuit has questioned whether a constitutional waiver should ever be found to insulate provisions in a cable franchising agreement (albeit in dicta). *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S. Ct. 839 (1990). While rejecting a cable company's attempt to obtain the restitution of a fine for violation of local origination provisions of franchise agreements, the Seventh Circuit said:

> Conceivably it could also be argued that CCTV contractually waived its First Amendment claim. In *Erie Telecommunications v. City of Erie*, 853 F.2d 1084 (3d Cir. 1988), the Third Circuit, after determining that constitutional rights, like rights and privileges of lesser importance, may be contractually waived, construed a consent decree settling a lawsuit between two rival cable programmers and the City of Erie as barring a later action by one of the cable programmers against the City. Since the consent decree settled a suit which included a First Amendment claim, the Third Circuit believed a later comparable First Amendment claim to be waived. Of course in this case the only contract was the initial franchising agreement, a significant distinction from *Erie*, and serious reservations arise when a local government with a virtual monopoly on cable access conditions a franchise contract with a cable programmer on the stipulation that the programmer waive certain constitutional rights, *see, e.g., Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 657-658 (1981); *Sherbert v. Verner*, 374 U.S. 398, 404-405 (1963); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 592-593 (1926). In any event we need not decide this issue since neither party advanced this argument here or in the district court.

Id. at 1548 n.6.

The potential damage to a cable operator's (and ultimately the public's) First Amendment rights through the

franchising process is potentially enormous. For example, cable operators, including Cablevision's parent, increasingly have originated local news programming.[14] Under the court's approach, a municipality could condition the grant or renewal of a franchise on the operator agreeing to forego or tailor its local coverage to the government's request. The recognized First Amendment rights a cable operator possesses—for the public's benefit—should not be so ephemeral.

We are not contending that a waiver of a cable operator's constitutional rights can never occur in proper circumstances. The dismissal of Cablevision's claims, however, improperly rests on an unresolved question of fact. The court should have reversed the dismissal of Cablevision's First Amendment claims and remanded for the development of a record on all relevant issues, including any waiver defense, by the City.[15]

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[14] *See, e.g.*, "Fires, School Board Meetings and Accidents, 24 Hours a Day," *Business Week*, Dec. 17, 1990, at 32; "News 12's Success Spawning 'Clones,'" *Multi Channel News*, Feb. 19, 1990.

[15] If a court ultimately concludes that what otherwise would be a First Amendment violation had been waived by Cablevision, then it would have to confront another issue before it (or the City) could conclude that the contract restriction is enforceable—*i.e.*, whether the provision has been preempted by the Cable Act of 1984, 47 U.S.C. § 556(c) (1991), as inconsistent with 47 U.S.C. § 544 (1991). That issue also requires a better record than the non-existent one that exists at this point in this case and further supports reversal and a remand on the First Amendment claim.

CONCLUSION

Cablevision is not asking the courts to protect it from competition, even from municipal competition. It does believe it is entitled to protection from predatory and anticompetitive competition from a municipally-owned cable system, and nothing in the federal antitrust laws or Arkansas law prevents that result. As a First Amendment speaker, much more than a non-existent record is required before a contrary conclusion can be reached.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 16, 1991

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APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1820

PARAGOULD CABLEVISION, INC.,
Appellant,

v.

CITY OF PARAGOULD, ARKANSAS; PARAGOULD LIGHT & WATER COMMISSION; CHARLES PARTLOW; DON PERKEY; DOUGLAS J. SMITH; TIM WOOLDRIDGE; BEN BRANCH; PHYLLIS DEES; JAY W. DORTCH; FRANK GATLIN; JAMES INNESS; GEORGE COOK; JEPTHA FUTRELL; JERRY JETTON; WILLIAM BREWER; and MACK SHOTTS,
Appellees.

Appeal from the United States District Court
for the Eastern District of Arkansas

Submitted: October 26, 1990

Filed: April 15, 1991

Before ARNOLD, Circuit Judge, FLOYD R. GIBSON and HEANEY, Senior Circuit Judges.

HEANEY, Senior Circuit Judge.

Paragould Cablevision (Cablevision) appeals from the district court's grant of the City of Paragould's (Paragould) and its Light and Water Commission's (CLW) motions to dismiss Cablevision's claims pursuant to Fed. R. Civ. P. 12(b)(6). Cablevision charged Paragould with

violations of the Sherman Act,[1] infringements of its first and fourteenth amendment rights, and breach of contract. The district court dismissed the federal claims with prejudice and then dismissed Cablevision's state-law contract claims without prejudice pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). We affirm.

FACTS

In December 1983, Cablevision entered into a cable television franchise agreement with Paragould. The agreement runs through 1993, with provisions for two five-year extensions. The franchise agreement is expressly nonexclusive. Despite this stipulation, Cablevision initially did not face any competition in the Paragould cable television market. However, in response to dissatisfaction with Cablevision's services, the voters of Paragould approved an ordinance in June 1986 authorizing the CLW to construct and operate a municipally owned cable television system. To finance the system, the residents of Paragould passed an October 1989 referendum which authorized Paragould to issue $3.22 million of municipal bonds. In January 1990, Paragould authorized the bonds to be issued. Later that month, Cablevision filed this suit against Paragould, the CLW, and various officers of these entities. As noted, the district court dismissed Cablevision's federal claims for failure to state a cause of action upon which relief could be granted and declined to exercise pendent jurisdiction over Cablevision's contract claims.

DISCUSSION

Cablevision appeals the district court's dismissal of its antitrust and constitutional claims.

I. *Antitrust Claims*

In a series of cases culminating in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the Supreme

[1] 15 U.S.C. § 2 (1988).

Court established that "before a municipality will be entitled to the protection of the state action exemption from the antitrust laws, it must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy." *Id.* at 40. More specifically, to withstand an antitrust challenge, the municipal conduct must be supported by "a clearly articulated and affirmatively expressed state policy." *Id.* at 44. In implementing this law, this circuit has explained that "the state policy to displace competition can be inferred 'if the challenged restraint is a necessary and reasonable consequence of engaging in the authorized activity.'" *Scott v. City of Sioux City*, 736 F.2d 1207, 1211 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985), quoting *Gold Cross Ambulance & Tran. v. City of Kansas City*, 705 F.2d 1005, 1013 (8th Cir. 1983). A municipality is therefore subject to searching antitrust scrutiny and can defeat antitrust challenges only if the anticompetitive consequence necessarily and reasonably results from engaging in the authorized activity. Importantly, "the Supreme Court has made clear that 'a specified, detailed legislative authorization' of monopoly service need not exist to infer the necessary state intent. *City of Lafayette v. Louisiana Power & Light Co.*, [435 U.S. 389, 415 (1978)]. It is sufficient that 'the legislature contemplated the kind of action complained of.' *Id.* (citation omitted)." *Gold Cross Ambulance & Tran. v. City of Kansas City*, 705 F.2d 1005, 1012 (8th Cir. 1983).

In a recent opinion, the Supreme Court suggested in dicta that there may be a market participant exception to state immunity. *See City of Columbia and Columbia Outdoor Advertising v. Omni Outdoor Advertising*, 1991 WL 41544.[2] As yet, however, the market participant ex-

[2] The Court voiced this suggestion on two occasions in its opinion: "[T]his [antitrust] immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market." "We reiterate that, with the possi-

ception is merely a suggestion and is not a rule of law. Until such a transformation occurs, we will continue to use the necessary and reasonable test established by this circuit.

Cablevision concedes that Arkansas law permits Paragould and the CLW to enter into the cable television business.[3] Cablevision objects, however, to both the method chosen to effectuate this entry, and to what it alleges is Paragould's predatory intent to destroy competition. Cablevision claims that by granting cable television rights to the CLW, Paragould has facilitated "monopoly leveraging," which has been defined as "the use of (1) monopoly

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ble market participant exception, any action that qualifies as state action is 'ipso facto' . . . exempt from the operation of the antitrust laws.'"

[3] The relevant statutes provide:

> 14-199-601. Authority of municipalities generally—Nonliable.
>
> (a) Any first-class city, second-class city, and incorporated town may own, construct, acquire, purchase, maintain, and operate a television signal distribution system for the purpose of receiving, transmitting, and distributing television impulses and television energy, including audio signals and transient visual images, to the inhabitants of the city or town and to the inhabitants of an area not to exceed two (2) miles outside the boundaries of the city or town.
>
> (b) In no case shall a city or town be held liable for damages for failure to furnish or provide the service.

Ark. Stat. Ann. § 14-199-601 (Supp. 1989).

> 14-199-602. Appliances, fixtures, and equipment authorized.
>
> The city or town may erect, construct, operate, repair, and maintain in, upon, along, over, across, through, and under its streets, alleys, highways, and public grounds, poles, cross-arms, cables, wires, guywires, stubs, anchors, towers, antennas, pipes, connections, and other appliances, fixtures, and equipment necessary, expedient, or useful in connection with a television signal distribution system.

Ark. Stat. Ann. § 14-199-602 (Supp. 1989). *See also*, Ark. Stat. Ann. §§ 14-199-303 & 309 (1987), which authorize municipalities to issue capital improvement bonds.

power in one market to (2) restrain competition in a second market." *White & White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 506 (6th Cir. 1983). Cablevision objects to the potential for the CLW to exploit its monopoly status in supplying utilities to drive Cablevision out of the Paragould cable television market. Cablevision argues that this potential exploitation exposes the predatory intent of Paragould and the CLW. According to Cablevision, this intent violates antitrust law because, although the statutes at issue allow a municipality to become a competitor in the cable television industry, they do not allow the municipality to place limitations on private competitors. Cablevision argues that its inability to engage in the monopoly leveraging which Paragould will permit the CLW to exploit results in Paragould placing a de facto limitation on Cablevision.

The district court rejected Cablevision's arguments. Characterizing the relevant statutes as "broad," sweeping," and "comprehensive," the district court concluded that these statutes authorized Paragould to develop its own cable television system, despite the anticompetitive implications of Paragould's particular conduct. We affirm the district court's decision, particularly in light of the voluminous case law reaching similar conclusions. *See, e.g., City of Columbia and Columbia Outdoor Advertising v. Omni Outdoor Advertising*, 1991 WL 41544 (city is immune from antitrust liability where its restriction of competition is a foreseeable result of implementing action authorized by state law); *L & H Sanitation v. Lake City Sanitation*, 769 F.2d 517, 522 (8th Cir. 1985) (holding state action immunity doctrine applicable to a city's award of exclusive solid waste disposal franchise); *Gold Cross Ambulance & Tran. v. City of Kansas City*, 705 F.2d 1005, 1007 (8th Cir. 1983) (holding defendants "shielded from federal antitrust liability because they established the municipal ambulance system pursuant to state authorization and a clearly articulated and affirmatively ex-

pressed state policy to displace free competition in the ambulance business").[4]

Arkansas has clearly authorized municipalities to enter into the cable television business. *See supra* note 2. Municipalities generally enjoy access to extant governmental infrastructure such as utility poles and rights of way. When a municipality, such as Paragould or its entity, the CLW, enters into the cable market, it necessarily will benefit from this access. Thus, by virtue of their status, Paragould and the CLW do not have to build their cable television operations from scratch. Presumably, rent-free office space is available, employees and "executives" are already hired and presently serving in other capacities, trucks and equipment to service cable needs are available, demographic information has been compiled and computerized, rights of way have been secured for other purposes, and utility poles are already standing. If the Arkansas legislature did not intend the utilization of these resources and the resultant benefit of being able to supply cable services with diminished overhead costs, it would have tailored the enabling statutes accordingly. Because of the nature and extent of municipal operations, the displacement of competition necessarily results whenever the state authorizes municipalities to enter into an industry with monopolistic tendencies.

We hold that a sufficient state policy to displace competition exists here since the challenged anticompetitive restraint is a necessary and reasonable consequence of Paragould's statutorily authorized entry into the cable television business. Accordingly, state action immunity attaches to the acts of Paragould and the CLW with respect to their development of a cable television system and the district court properly granted their 12(b)(6) motions.

---

[4] The Supreme Court's recent decision to grant municipalities immunity against being sued when they award local monopolies to private businesses also supports our holding.

II. *Constitutional Claims*

Cablevision also objects to the district court's dismissal of its first and fourteenth amendment claims. Cablevision specifies three first amendment violations. First, according to Cablevision, a provision of the franchise agreement between it and Paragould infringes its commercial free speech rights by requiring Cablevision to notify and gain the approval of Paragould before soliciting advertising to air on its system. The relevant provision, Section 2.4 of the franchise agreement, stipulates:

> This agreement does not cover major technical advances in TV reception and use, in cable TV or in TV-related technology such as, but not limited to, two-way capability, teleconferencing, or use of inexpensive individual satellite receivers or components thereof. It does not cover additional income-producing activities of [Cablevision] such as advertising over [Cablevision's] cable TV system. If [Cablevision] should decide to offer services to subscribers involving these or other major technical advances or to undertake other income producing activities, it will first notify the City and offer its proposed modification to this Agreement to cover such additional services and activities, and the proposed modification shall be subject to negotiation.

Second, Cablevision argues that the franchise agreement between the CLW and Paragould, which contains no restriction on income-producing activities such as advertising, violates the first and fourteenth amendments by favoring certain speakers over others. Because Section 2.4 limits Cablevision's ability to engage in commercial speech, and because the CLW is not similarly restrained, Cablevision claims that this differing treatment infringes both its first amendment free speech and its fourteenth amendment equal protection rights. Finally, Cablevision maintains that Paragould will permit advertising only if a portion of the advertising revenues is included in the

franchise fees paid by Cablevision to Paragould. The CLW is not similarly burdened. Cablevision claims that this selective imposition of a franchise fee constitutes a discriminatory media tax, whereby by one member of the media suffers from differential taxation relative to its competitors. *See Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 578-79 (1983).

After reviewing each of these arguments, we affirm the district court's dismissal of Cablevision's constitutional claims. First, we agree with the district court's judgment that Section 2.4 "is contractual in nature . . . ." Nonetheless, we recognize that Paragould's alleged insistence on honoring the terms of the contract does indeed inhibit Cablevision's ability to air commercials, and thus limits free speech in the purest sense. *See Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980). By entering into the franchise agreement, however, Cablevision effectively bargained away some of its free speech rights. Cablevision could have bargained for an unqualified right to solicit and transmit advertisements. No law mandated otherwise. Cablevision simply failed to protect its commercial rights. Presumably Cablevision received consideration in return for this sacrifice, but apparently what was once considered a satisfactory bargain has turned into a sour deal. Regardless, Cablevision cannot now invoke the first amendment to recapture surrendered rights.

Without a finding that Section 2.4 implicates constitutionally protected free speech rights, Cablevision's second argument that Paragould's franchise agreement with the CLW unconstitutionally favors the CLW by not including a provision similar to Section 2.4 collapses. Cablevision contends that the dichotomy between the two contracts creates an equal protection problem involving first amendment rights. In making this distinction, Cablevision forgets that it bargained for its franchise agreement. Cable-

vision voluntarily entered into the franchise agreement, presumably for its own economic gain. The forum for protecting its free speech rights was the bargaining table, not the courtroom seven years later.

Cablevision's allegation of a discriminatory media tax also lacks merit. We are inclined to agree with the district court that this claim is premature. As yet, Paragould has not extracted any sort of "advertising fee" from Cablevision nor has Cablevision submitted any convincing evidence to support the imminency of such a fee. Hence, a justiciable controversy for Article III review does not exist. However, because we are reviewing Cablevision's claims pursuant to a motion to dismiss, we will accept its allegation of a media tax as true. Even when we accept this issue as being substantively ripe, we again hold that Cablevision bargained for its position and therefore must comply with the terms of the franchise agreement.

III.

The district court properly granted defendant's motions to dismiss Cablevision's antitrust and constitutional claims with prejudice. We also affirm the district court's refusal to exercise jurisdiction over the pendent state contract claims, which the trial court appropriately dismissed without prejudice.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

J-C-90-14

PARAGOULD CABLEVISION, INC.,
Plaintiff,

v.

CITY OF PARAGOULD, ARKANSAS, *et al.*,
Defendants.

ORDER

[Filed May 9, 1990]

In this action plaintiff seeks injunctive relief for alleged violations of the Sherman Antitrust Act, 15 U.S.C. § 2 (1976), the First and Fourteenth Amendments to the United States Constitution as well as the laws of the State of Arkansas. At issue before the Court are defendant City of Paragould and its Light and Water Commission's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff has responded. The Court will grant the motions for the reasons indicated in the body of this Order.

I. THE STANDARD ON MOTIONS TO DISMISS

Under a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted the complaint is to be construed in the light most favorable to plaintiff and its allegations are taken as true. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). *See also Baxley-DeLamar Monuments, Inc. v. American Cemetery Association*, 843 F.2d 1154 (8th Cir. 1988).

The critical issue is the sufficiency of the complaint which is governed by the pleading standard stated in Rule 8(a). A pleading setting forth a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Included then, in the determination of whether a claim is stated is the calculus of whether relief can be granted on this claim. *Davis v. Passman*, 442 U.S. 228 (1979).

The sufficiency requirement most frequently utilized is derived from the Supreme Court's pronouncement that

> in appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41 (1957).

Mindful of these guiding principles, the Court addresses defendants' motions.

II. FACTS

A. Parties and Jurisdiction

Plaintiff Paragould Cablevision, Inc. ("PCI") is a Massachusetts corporation headquartered and with its principal place of business in Greene County, Arkansas. Plaintiff operates a cable television system in Paragould, Arkansas under a franchise agreement entered into on November 28, 1983.

The complaint names 16 defendants including the City of Paragould ("the City"), its Light and Water Commission ("LWC"), the mayor and 13 individual members of the City Council and the Light and Water Commission. Paragould is an incorporated city and the LWC is a municipal entity created under A.C.A. § 14-200-106 with

the charge to operate the City's water and electric systems.

Jurisdiction lies under Section 16 of the Clayton Act of 1914, codified at 15 U.S.C. § 26, 42 U.S.C. § 1983, 28 U.S.C. § 1331 and by pendant jurisdiction over the State law claims. Venue is proper in the Eastern District of Arkansas pursuant to 28 U.S.C. § 1391(b).

B. Background

The Franchise Agreement entered into between the City and PCI was explicitly termed non-exclusive. In the past seven years, plaintiff has had no competition in the operation of its cable system in Paragould. However, on June 17, 1986 an ordinance authorizing the construction and operation of a municipal cable system was approved by referendum vote and on January 16, 1989, a franchise agreement was concluded between the City and LWC for the latter to build and operate a system in Paragould. To finance the municipal system, the City conducted a referendum vote to authorize issuance of $3.22 million of municipal bonds which passed on October 31, 1989. On January 22, of this year, the City acted pursuant to the referendum and authorized the bonds to be issued.

C. The Nature of the Claims Alleged

Plaintiff's 17 page complaint alleges numerous violations in three Counts which are divided among antitrust violations, violations of the First and Fourteenth Amendments, and breach of state contract law claims respectively.

The alleged Sherman Act violations derive from the Section 2 monopoly prohibition which states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade

> or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2.

Plaintiff alleges *inter alia* that its Count I claims assert "its right to be free from unfair and illegal competition brought about by Defendants' dual role as a direct competitor of Cablevision and as a utility operator with exclusive control over utility poles which are vital to the existence of Cablevision." Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss, p. 2 (hereafter "Plaintiff's Memorandum"). Specifically, plaintiff asserts a monopoly leverage theory of liability which is defined as "the use of monopoly power in one market to amplify or 'leverage,' a position in another competitive market." *Kerosotes Michigan Theatres v. National Amusements*, 854 F.2d 135, 137 (6th Cir. 1988), *cert. dismissed*, —— U.S. ——, 109 S.Ct. 2461 (1989) (citations omitted). Here, the defendants are alleged to possess a monopoly over the electricity and water services and are allegedly attempting to "leverage" their economic power in the cable television market. The acts comprising violations under this theory are (1) LWC's ownership of electric utility poles and its power, under the Pole Attachment Agreement, entered into by PCI and LWC, to restrict PCI's use of those poles and to terminate the Agreement under certain circumstances; (2) the failure to correctly assess and include the cost of the relocation of utility poles necessary for installation of LWC's cable system wires in the financial estimates for the project used by the City; and (3) LWC's plan to string cable wire in alleged violation of

certain spacing safety standards promulgated in the National Electric Safety Code.

Defendants assert their immunity to antitrust liability under the "State Action Immunity" doctrine and argue that, in any event, not only does the complaint fail to state a Sherman violation but any alleged violations have yet to occur and are unripe.

Plaintiff in Count II alleges violations of the First and Fourteenth Amendments stemming from restrictions imposed on PCI's unfettered right to sell and transmit advertising in the absence of similar restrictions on LWC's ability to do likewise. Plaintiff finds that these contractual disparities constitute regulation of legitimate commercial speech in the absence of substantial state interest. PCI also alleges that the restrictions amount to "selective taxation in a situation where, all things being equal, one party remains exempt from taxation and the other party does not." *Id.* at p. 19.

For their part, defendants argue that a probable franchise fee of 3% on any additional advertising is not so burdensome as to rise to the level of a First Amendment violation and the claim of unequal treatment in a contractual setting similarly does not state a violation of the Fourteenth Amendment.

Count III alleges breaches of good faith and fair dealing amounting to contractual breach under Arkansas law.

Defendant seeks dismissal under *Mine Workers v. Gibbs*, 388 U.S. 715, 86 S.Ct. 1130 (1966), for lack of federal jurisdiction over the pendant state claims.

III. THE ANTITRUST CLAIMS

A. Legislative Immunity

As an initial matter the Court finds that plaintiff's claims against the individual members of the City and the members of the LWC under 42 U.S.C. § 1983 are

barred. Legislators are absolutely immune from suit for all damages or injunctive relief when performing their roles "in a field where legislatures traditionally have power to act." *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951); *Green v. DeCamp*, 612 F.2d 368 (8th Cir. 1980). When engaged in the implementation of laws, city or executive officers are not absolutely immune. *See e.g. Latino Political Action Comm. v. City of Boston*, 581 F.Supp. (D.C. Mass. 1984), *aff'd*, 784 F.2d 409 (1st Cir. 1986).

Here, there is no allegation that the individuals named as defendants acted in any capacity other than their official ones. The City Council and the LWC have not been said to have implemented laws in violation of the constitutional rights of plaintiff.

It is also a point worthy of note that although municipalities are granted immunity from damages arising from their anticompetitive acts in violation of the antitrust laws under the Local Government Antitrust Act of 1964, 15 U.S.C. §§ 34-36, this act

> in no way affects a plaintiff's ability to bring suit against a local government for injunctive relief against 'threatened loss or damage by a violation of the antitrust laws' under Section 16 of the Clayton Act, 15 U.S.C. § 26. Nor does it prevent the award of reasonable attorney's fees to a plaintiff "substantially prevailing' in such a suit. In such injunctive actions, the defendant(s) would be forced to rely on traditional antitrust analysis, rather than the Local Antitrust Act, to seek immunity or to establish other defenses.

Sinel, *The Lawful Regulation of Cable Television*, 241 PLI/Pat 259, p. 44 (Westlaw) (1987). We now reach the issue of immunity under traditional antitrust doctrines.

B. State Action Immunity

1. *The Basis for the Doctrine*

States are possessed of immunity from antitrust liability when acting as the "sovereign". *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307 (1943). The source of this rule has been alternatively attributed to the needs of federalism under the model of preemption or to an exceptional status accorded states under the antitrust regime. Under federalism theory courts recognize the existence of two sovereigns, the federal and the state. The operative inquiries are: has the federal government exclusively occupied the field and even if not, are the laws of the federal and state governments so in conflict as to irrevocably collide. In the words of Chief Justice Stone, "the states are sovereign, save only as Congress may constitutionally subtract from their authority." *Parker* at 351.

Under the rubric of "state action exemption," a term often used by courts, we observe that there is only one sovereign on display, the federal power, and that this sovereign may permit certain exceptions:

> courts routinely presume that antitrust is the dominant national policy and that, accordingly, it should be displaced only where there is plain repugnancy between the enactments—and even then "only to the minimum extent necessary." Since most federal regulations postdate the passage of the Sherman Act in 1890, the tendency is to regard regulation as an alien intruder into antitrust's domain. Thus the exemption cases are generously sprinkled with such shibboleths as "[r]epeals of the antitrust laws by implication . . . are strongly disfavored. (Citations omitted).

Handler, *Antitrust-1978*, 78 Colum. L. Rev. 1374, 1378-79 (1978) (quoted in Kalinowski, 6 *Antitrust Laws and Trade Regulation*, § 46.04[1] (1989)).

The Supreme Court has decided cases since *Parker* under both doctrinal heads but it seems clear that the doctrines are in conflict. In *Cantor v. Detroit Edison*, 428 U.S. 579, 96 S.Ct. 3110 (1976) and in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123 (1978) the Court's holdings were bottomed on the immunity-as-exception theory. The dissenters in *Community Communications v. City of Boulder*, 455 U.S. 40, 102 S.Ct. 835 (1982) *rev'g* 630 F.2d 704 (10th Cir. 1980) opined the majority's neglect of the Supremacy Clause and "our basic notions of federalism." *Id.* at 61.

> Because pre-emption treads on the very sensitive area of federal-state relations, this Court is "reluctant to infer pre-emption," [citation omitted] and the presumption is that pre-emption is not to be found absent the clear and manifest intention of Congress that the federal Act should supersede the police powers of the States. [Citation omitted].

Id. In recent cases the Court has invoked preemption concerns as the basis for the immunity but has not resisted the siren call of terming the immunity "state action exemption." *See 324 Liquor v. Duffy*, 479 U.S. 335, 107 S.Ct. 720, 725 (1987), *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 1662, *reh'g denied*, 108 S.Ct. 2921, (1988).

2. *The Parker Doctrine Applied to Municipalities*

While *Parker* taught that a state's otherwise anti-competitive acts would not be scrutinized under the same penetrating eyepiece as private entity's, it did not reach the issue of the status of the state's political subdivisions.

In *City of Lafayette, supra*, the Supreme Court expressly removed cities from the broad *Parker* immunity on the basis of their status alone. The immunity conferred by *Parker* was formulated as follows: "*Parker* exempts only anti-competitive conduct engaged in as an

act of government by the State as sovereign, or by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." 98 S.Ct. 1137. Whenever cities act as "agents" of the State they are "free to implement state policies without being subject to antitrust laws to the same extent as would the State itself." *Id.* The question of when a local entity is acting in the guise of "agent" is answerable when the State's grant of "authority . . . to operate in a particular area [indicates] that the legislature contemplated the kind of action complained of" in the antitrust complaint. *Id.* at 1138. Legislative contemplation was heralded as "a clearly articulated and affirmatively expressed" policy but a city need not "be able to point to a specific, detailed legislative authorization."

Four years later the Court found that a city operating by dint of its home rule power rather than under authority of the state was not cloaked in *Parker* immunity. The operative determination in *City of Boulder, supra,* was the neutrality of the state *vis a vis* Boulder's decision to restrain the expansion of its private cable company's service. "A state that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anti-competitive actions for which the municipal liability is sought." Thus the outer reaches of municipal *Parker* immunity were defined.

With the parameters of immunity taking recognizable shape, the Court proceeded to refine the doctrine of municipal *Parker* immunity in *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 105 S.Ct. 1713 (1985). The Court's opinion effectively removed the second prong of the traditional two prong test for state action immunity stated by *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937 (1980). There, in the context of anticompetitive activities of a state sponsored private party, in addition to the grant of authority by a state, active state supervision was re-

quired for immunity to apply. Whether supervision was also required when the actor was a local unit of government was left in the air, even in *Boulder. Town of Hallie* grounded the issue and held: "[w]e now conclude that the active state supervision requirement should not be imposed in cases in which the actor is a municipality." *Id.* at 1720.

3. *"Clearly Articulated and Affirmatively Expressed State Policy"*

The issue before the Court is whether the City of Paragould and its Light and Water Commission acted under a "clearly articulated and affirmatively expressed state policy." The Court will treat the potential liability of the LWC as coterminous with that of the City unless a distinction presents itself.

In *L & H Sanitation v. Lake City Sanitation*, the Eighth Circuit summarized its *Parker* inquiry in two steps:

> First, the state legislature must have authorized the challenged municipal activity. Second, the legislature must have intended to displace competition. [Citation omitted]. [T]he state policy to displace competition can ge inferred "if the challenged restraint is a necessary and reasonable consequence of engaging in the authorized activity.

769 F.2d 517, 421 (8th Cir. 1985). *See also Scott v. City of Sioux City*, 736 F.2d 1207, 1211 (8th Cir. 1984); *Gold Cross Ambulance v. City of Kansas City*, 705 F.2d 1005, 1013 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003, 105 S.Ct. 1864 (1985). The opinion in *L & H Sanitation* affirmed this Court's finding of municipal immunity for Lake City's grant of an exclusive franchise for disposal of its solid waste. The Court found that in passing the Arkansas Solid Waste Management Act conferring broad authorities on cities to regulate the disposal of their solid

waste the legislative intended for municipalities to take action to "displace competition" and that such acts would be "a necessary consequence of engaging in the authorized activities." *Id.* at 522.

Plaintiff here argues that while the City's decision to enter into the Paragould cable market is no violation of the Sherman Act, its "intent to destroy any competition in cable television in Paragould," that is, its "*methods*," do "state an antitrust claim." Plaintiff's Memorandum pp. 8-9. And, argues plaintiff, citing dicta in a footnote in this Court's decision in *Brazil v. Arkansas Board of Dental Examiner*, "if the agency or municipality exceeds the bounds of its authority to establish trade restraint, *Parker immunity will not attach.*" 593 F.Supp. 1354, 1361 n. 5 (E.D.Ark. 1984), *aff'd* 759 F.2d 674 (8th Cir. 1985). Of course, the issue of whether the City has acted *ultra vires* will be decided by the same process as the determination of whether immunity should attach, the existence of proper state authorization. Plaintiff's argument is therefore tautological.

In 1987 the General Assembly of Arkansas passed two statutes relating to cable television. The first, contained in Act 328 of 1987 § 1, and codified at A.C.A. § 14-199-601, states in subsection (a):

> Any first-class city, second-class city, and incorporated town may own, construct, acquire, purchase, and operate a television signal distribution system for the purpose of receiving, transmitting and distributing television impulses and television energy, including audio signals and transient visual images, to the inhabitants of the city or town and to the inhabitants of an area not to exceed two (2) miles outside the boundaries of the city or town.

To this general grant of power is appened a second, more specific statute, 14-199-602, which provides with Levitical precision that:

> [t]he city or town may erect, construct, operate, repair, and maintain in, upon, along, over, across, through, and under its streets, alleys, highways, and public grounds, poles, cross-arms, cables, wires, guy-wires, stubs, anchors, towers, antennas, pipes, connections, and other appliances, fixtures, and equipment necessary, expedient, or useful in connection with a television signal system.

Municipal capital improvements, including "facilities for the generation, transmission, and distribution of television communications" may be financed by issuance of municipal bonds, subject to the passage of an authorizing ordinance and approval by the electorate of the municipality. A.C.A. §§ 14-164-303, 309 (1989).

Predictably, plaintiff argues that "the generalized language used in the authorizing statutes cited by Defendants is not nearly enough to provide the overbroad exemption Defendants are claiming." Plaintiff's Memorandum, p. 6. Plaintiff is mistaken.

The Court notes that plaintiff terms the grant of powers to cities, "general," but the Court would add to that characterization the adjectives "broad," and even without much hyperbole, "sweeping" and "comprehensive." The Court therefore finds that these statutes authorize the entry of the city into the market and reflect the state's policy to permit the city "to displace competition" since "the challenged restraint is a necessary and reasonable consequence of engaging in the authorized activity." *L & H Sanitation, supra.* The Court also finds that the legislature necessarily contemplated the possibility that cities would choose to develop their own cable television system despite the anticompetitive nature of that decision. Defendant's argument directed to this point is well taken.

The clear delegation of control to cities over their television systems expressed in the cited statutes makes the Court's finding of immunity for the City and its LWC

relatively straightforward. *See also* Saylor, *Selected Antitrust Issues Facing Cable Television Operators, Suppliers and Competitors*, 267 PLI/Pat 107 (1989). *Cf. City Communications, Inc. v. City of Detroit*, 888 F.2d 1081 (6th Cir. 1989) (city immune because state constitutional grant to municipalities to control the public streets reasonably foresaw decision by local government not to renew non-exclusive franchise even without mention of cable television); *Consolidated Television Cable Service, Inc. v. City of Frankfort*, 857 F.2d 354, 359-62 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 1537 (1989) (*Parker* immunity attaches since state statute expressly contemplates municipal ownership of public utilities and state constitution expressly contemplates franchising of public utilties); *Best View Cablevision, Inc. v. City of Abbeville*, 758 F.2d 1408 (4th Cir. 1986) (renewal and order to vacate poles was within express South Carolina statutory authorization to 'regulate' cable operations and was immune under *Parker*); *Catalina Cablevision Associates v. City of Tucson*, 745 F.2d 1266 (9th Cir. 1984) (city's grant of nonexclusive franchise and rejection of plaintiff's application were actions pursuant to a state statute expressly empowering city to restrict operation and construction of cable systems and, hence, was immune under *Parker*); Moreover, the Court notes that

> [n]narrowly drawn, explicit delegation is not required. The Supreme Court has never held 'that the challenged municipal conduct need to be inescapably mandated by the State."

Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1413-14 (9th Cir. 1985), *aff'd on other ground*, 467 U.S. 488, 106 S. Ct. 2036 (1986). As understood by the Supreme Court in its early pronouncement in *City of Lafayette*:

> [w]ere it otherwise, the specter of antitrust liability would unduly hamper the state's ability to allocate governmental authority between itself and its sub-

> divisions. Restricted too would be its use of municipalities to regulate areas requiring flexibility and the exercise of wide discretion at the local level.

98 S.Ct. at 1138 (plurality opinion).

With the finding that state action immunity attaches to the acts of the City and the CLW the Court will not reach the merits of plaintiff's claim of monopoly leveraging violations or any other violations under § 2 of the Sherman Act. Count I of the complaint will be dismissed in its entirety.

IV. THE FIRST AND FOURTEENTH AMENDMENT CLAIMS

The First Amendment is applicable to the states by incorporation into the Fourteenth Amendment. The First Amendment protects commercial speech subject to significant limitations. The initial inquiry, of course, is whether or not speech is implicated at all in the state action that is the subject of the claim. In other words, is there regulation and if so, does that regulation infringe on protected speech. If so found the reviewing court must ascertain whether the commercial speech concerns a lawful activity and is not misleading or fraudulent. Once these initial hurdles are cleared the court must employ a three-part test. The interest of the government in the particular regulation must be "substantial," the regulation must "directly advance" the government's asserted interest, and finally, it must be "no more extensive than necessary." *Posados de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 106 S.Ct. 2968 (1986).

Plaintiff first claims that the provision of its 1983 Franchise Agreement that requires PCI to engage in a process of negotiation and modification of its Agreement with the city should it choose to air advertisements on its cable networks violates its First Amendment rights. Section 2.4 reads in relevant part as follows:

> This agreement does not cover major technical advances in TV reception and use, in cable TV or in TV-related technology such as, but not limited to, two-way capability, teleconferencing, or use of inexpensive individual satellite receivers or components thereof. It does not cover additional income-producing activities of Grantee such as advertising over Grantee's cable TV system. If Grantee should decide to offer services to subscribers involving these or other major technical advances or to undertake other income producing activities, it will first notify the City and offer its proposed modification to this Agreement to cover such additional services and activities, and the proposed modification shall be subject to negotiation.
>
> * * * *
>
> The parties also recognize that such advanced technology may make cable TV as contemplated by this Agreement obsolete or virtually certain to be unprofitable to the operator. Upon the practical advent of any such technical advance, either party may propose that this Agreement be opened for further negotiation and modification so that each party may better protect its interests.

Plaintiff's constitutional claim that this provision "amounts to a restriction on *all* advertising by Cablevision" is, in the Court's view, a considerable leap. Plaintiff's Memorandum, p. 18. It seems clear to the Court that the purpose of Section 2.4 is to anticipate contractual contingences for the protection of the parties. The phrase "cable TV as contemplated by this Agreement" fully captures this spirit. The Court finds that the requirements complained of do not outlaw or curb advertisement as protected commercial speech. Rather, they offer the parties a mechanism by which they may, at their election, submit proposals for the modification of existing contractual terms should unusual circumstances so require. The

Court notes the permissive language in the provision: "[i]f Grantee should decide to . . . undertake other income producing activities," which makes the process of modification wholly elective. Since the decision to air advertisements is outside the Agreement, 2.4 does not constitute regulation of commercial speech. At most it could be characterized as a mechanism for mutual regulation of an Agreement which infringes on speech rights to the same extent as it prevents the advent of technological changes in Paragould; that is to say, not at all. In short, this provision is contractual in nature and does not seek, nor have the effect of, regulating speech of any kind.[1] This claim will be dismissed.

From this conclusion of law flow others. Since speech is not restricted by Section 2.4, the absence of a similar provision in the City's agreement with LWC could not rise to a violation of the Fourteenth Amendment Equal Protection Clause nor does it "restrict the speech of some elements of society in order to enhance the relative voice of others" as suggested by plaintiff. Plaintiff's Memorandum, p. 18 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)). A party contracting to buy widgets from Company A does not violate equal protection when it contracts to buy zidgets from Company B.

Finally, plaintiff's complaint alleges that "while [the City] may be willing to acquiesce to Paragould Cablevision's request to insert local advertisements, it will do so only if the revenues from such advertisements are included in the franchise fees paid" to the city. Complaint, para. 37. Such an inclusion, argues plaintiff, amounts to a selective and discriminatory media tax since LWC is

[1] The Court notes in passing that cities may place reasonable time, place and manner restrictions on the protected right to engage in commercial speech when the limits serve a significant governmental interest and leave open other channels of communication. *See e.g. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1825 (1976).

not, even in the abstract, subject to such a "tax." This claim is, as a threshold matter, premature since the issue rises, if at all, in the future, and therefore does not raise a justiciable controversy for Article III purposes. Along with its jruisdictional infirmity this claim is frivolous. Contractual modifications do not automaticaly become tax questions merely because one party is a political subdivision with taxing authority and, as found above, the provisions of 2.4 do not inhibit speech. This claim will also be dismissed.

V. THE PENDANT STATE-LAW CLAIMS

Becaus none of plaintiff's federal claims survive the 12(b)(6) motion to dismiss, federal jurisdiction over the state-law contract claims would, at this stage of this proceeding, be inappropriately maintained by this Court. *Mine Workers v. Gibbs*, 388 U.S. 715, 86 S.Ct. 1130 (1966). As the Supreme Court recently wrote:

> Under *Gibbs*, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendant state-law claims. When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the law suit in its early stages and only state-law claims remain, the federal court should decline to exercise of jurisdictions by dismissing the case without prejudice.

Carnegie-Mellon University v. Cohill, 484 U.S. 343, 108 S.Ct. 614, 618-19 (1988). Accordingly, the Court will dismiss these claims without prejudice to future suits.

IT IS THEREFORE ORDERED that defendants' Motions to Dismiss be, and they are hereby, GRANTED. Counts I and II, comprising the antitrust and First and

Fourteenth Amendment claims, are dismissed with prejudice and Count III, containing the state-law claims, is dismissed without prejudice.

Dated this 8th day of May, 1990.

/s/ Garnett Thomas [Illegible]
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1820EA

PARAGOULD CABLEVISION, INC.,
Appellant,

v.

CITY OF PARAGOULD, ARKANSAS; *et al.*,
Appellees.

Order Denying Petition for Rehearing
with Suggetsion for Rehearing En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

The petition for rehearing is also ordered denied.

June 18, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk
U.S. Court of Appeals, Eighth Circuit

CABLE TV FRANCHISE AGREEMENT

KNOWN ALL MEN BY THESE PRESENTS, THAT

WHEREAS, Paragould Cablevision, Inc., a corporation organized under the laws of the State of Massachusetts with a place of business in Waltham, Massachusetts, authorized to do business in the State of Arkansas, hereinafter called "Grantee," is currently operating a cable television system in the City of Paragould, Arkansas with over 4,000 subscribers under Ordinance 721 as amended by Ordinance 1039, and desires to extend its franchise to continue to operate a cable TV system in Paragould; and

WHEREAS, the Mayor of the City of Paragould, Arkansas, has been authorized by Resolution #83-22, which supersedes Ordinances 721 and 1039 from and after the effective date hereof, to enter into this Agreement with Grantee;

NOW THEREFORE, the Ctiy of Paragould, referred to herein as "City" or "Grantor" and the Grantee agree as follows, to wit:

1. Grant of Franchise

(1.1) Subject to compliance by Grantee with its obligations under this Agreement as they mature, the Grantor hereby grants to the Grantee a non-exclusive franchise to operate a cable TV system throughout the entire City as now constituted (including during the term hereof any areas now outside the City which may become subject to the City's jurisdiction, without any need for specific modification of this Agreement). This franchise includes the right to install cable and other cable system hardware in, upon, along, over and under the City's streets, avenues and other public ways, subject to (1.11) and (1.12) below.

(1.11) Grantee shall utilize existing light, power, or telephone poles when economically and technically feasible

and shall pay an annual rental to the entity owning such poles, and if such entity is the City Light and Water System, that System shall be considered as a separate entity from the City of Paragould for the purpose of this Agreement. The rental shall be as agreed upon between the Grantee and the entity concerned.

(1.12) Before the Grantee erects its own pole or makes any other installation upon City owned or controlled property, the Grantee shall obtain a permit from the City Inspector and shall coordinate the work with the City Light and Water System and with any utility whose lines may be affected. Any pavements, sidewalks, curbing, or other installed improvement taken up and any and all excavations made by Grantee shall be done in such manner as to give the least inconvenience to the inhabitants of the City and the public generally. The work shall be completed with all convenient speed and the premises restored to at least the condition existing before the work was undertaken, all at the expense of the Grantee. The Grantee shall in addition make and complete records and "as installed" maps showing the location of its facilities in the City, with a copy furnished to the City. The Grantee shall not place poles or other fixtures where they will interfere with existing utility lines and installations.

2. Effective Date, Term and Renewal

(2.1) This Agreement shall take effect December 10, 1983 and shall continue in full force and effect until December 9, 1993; provided, however, that there shall be a review of the terms hereof and of the Grantee's performance hereunder at the end of the first five year period. Such review shall take place between December 11, 1988 and June 30, 1989. As a result of such review, the following matters may become subject to negotiation:

(a) Grantee's charges to subscribers if the review discloses either that Grantee is making an un-

reasonable profit or, despite competent management, is not making a reasonable profit.

(b) Grantee is failing to provide basic cable TV service to a substantial number of residents of the City who desire such service, if there is evidence to that effect.

(c) The nature and/or quality of Grantee's service if a substantial number of credible complaints relating thereto have been received.

(d) The Grantee's handling of complaints, changes, or charges or other interfaces with subscribers if such handling has been marginal or worse.

(e) The City's failure to comply with any terms of this Agreement in a timely, businesslike manner.

Any matter subject to negotiation shall be resolved by agreement and incorporated herein by written amendment.

(2.2) The Grantee shall have an option to extend this Agreement for an additional five years following the 10-year period identified in (2.1) above, provided Grantee gives Grantor notice of its desire to exercise such option between January 1, 1993, and June 1, 1993, subject to a review of Grantee's performance, essentially similar to the review described in (2.1) above, such review to be held within 2 months after receipt of such notice by the City. Such review shall also take into account the Grantee's utilization in the performance of its obligation hereunder of such advanced technology as may be offered in the cable television industry. As a result of such review, any issues subject to negotiation shall be resolved by agreement and incorporated in writing into this Agreement as extended by exercise of the option.

(2.3) This Agreement may be extended for an additional five-year period after December, 1998 by mutual agreement of the parties hereto; provided, that if either

party determines at any time during the five year period covered in (2.2) above that it does not wish to extend the Agreement from and after December 9, 1998, it will promptly give the other party written notice to that effect. If such written notice is not given, neither party may unreasonably withhold its agreement to the five year extension beginning December 10, 1998.

(2.4) This Agreement does not cover major technical advances in TV reception and use, in cable TV or in TV-related technology such as, but not limited to, two-way capability, teleconferencing, or use of inexpensive individual satellite receivers or components thereof. It does not cover additional income-producing activities of Grantee such as advertising over Grantee's cable TV system. If Grantee should decide to offer services to subscribers involving these or other major technical advances or to undertake other income producing activities, it will first notify the City and offer its proposed modification to this Agreement to cover such additional services and activities, and the proposed modification shall be subject to negotiation. The parties recognize that services involving use of such advanced technology may be offered by others (e.g. the telephone company) and that the offering of such services may not require a franchise agreement or a modification of this Agreement. The parties also recognize that such advanced technology may make cable TV as contemplated by this Agreement obsolete or virtually certain to be unprofitable to the operator. Upon the practical advent of any such technical advance, either party may propose that this Agreement be opened for further negotiation and modification so that each party may better protect its interests.

3. Indemnification and Insurance

(3.1) Grantee shall indemnify and save the City harmless from all losses sustained by the City on account of any claim or demand, whether litigated or not, arising out

of the operation and maintenance of Grantee's cable TV system covered by this Agreement. Grantor shall notify the Grantee promptly but in no event later than 30 days after the presentation of any claim or demand made against the Grantor which is indemnified hereunder. The indemnification provided by the Grantee hereunder shall include reasonable attorney's fees.

(3.2) The Grantee shall carry liability insurance covering property damage in an amount not less than $500,000 and covering personal injury in an amount not less than $1,000,000 as to any one person and not less than $3,000,000 as to any one accident. Such coverage shall apply to all of Grantee's operations including its vehicles, and shall be written by reputable insurance companies authorized to do business in the State of Arkansas. Grantee shall keep on file with the City Clerk a Certificate showing that such coverage has been obtained and is current. If Grantee employs contractors or subcontractors, it shall require adequate liability insurance to be carried by them during their employment by Grantee. Certificates furnished to the City Clerk shall include a statement from the insurer that in event of cancellation or other termination, the insurer shall promptly notify the City Clerk in writing.

4. Miscellaneous Authorities

(4.1) The City understands that Grantee will promulgate reasonable rules and regulations applicable to its subscribers which are necessary to enable Grantee to exercise its rights and perform its services under this franchise and to provide uninterrupted service to its customers.

(4.2) The Grantee recognizes that the City has the right of reasonable regulation of the erection, construction and/or installation of facilities by Grantee, including regulation of the location of such facilities of Grantee to be placed on property belonging to or under the control of the City.

(4.3) The Grantee shall, upon the request of any person holding a permit from the City for moving a building or other outsize load, temporarily raise or lower its wires to permit the passage of the load, provided the Grantee is given no less than 48 hours notice to arrange for such passage. The expense of such arrangement shall be borne by the party moving the outsize load, and the Grantee may request payment in advance.

(4.4) The Grantee shall have authority to trim trees which overhang streets, sidewalks and other public ways when such trimming is necessary to prevent interference with Grantee's wires and cables. Such trimming shall be done under the supervision of an authorized representative of the City, but at Grantee's expense. The entity known as City Light and Water may perform the trimming for Grantee and Grantee's request and expense, the charge to Grantee to be a matter for agreement between Grantee and City Light and Water System.

(4.5) If, during the time this Agreement is in effect, the City lawfully alters any street, sidewalk or other public way such that Grantee's poles, wires or other fixtures and equipment are affected, the Grantee, upon reasonable notice from the City, shall make such adjustments in its poles, wires or other fixtures and equipment as may be necessary (including but not limited to removal and relocation) at Grantee's expense.

(4.6) Nothing in this Agreement shall exempt or exclude Grantee from application of the City's police power or from the application of lawful City ordinances.

5. Operation and Maintenance of the Cable TV System

(5.1) Subject to applicable FCC regulations which specify "must carry" stations to the Grantee, the Grantee shall provide at its expense all equipment and facilities necessary to provide subscribers in the City a basic program of not less than 11 channels, to include: the major networks; the nearest "local" station (Jonesboro); a sta-

tion that broadcasts the Cardinal baseball games in St. Louis; one or more public TV stations; a religious station; an all sports network; one or more Little Rock stations including one that broadcasts the Razorback football and basketball games when they are televised; and one or more Memphis stations. It is recognized that there is possible overlap in these criteria (e.g.: a Little Rock station may also carry Razorback games). The objective is to provide a wide range from which the varied tastes and preferences of the greatest number of subscribers would most likely be satisfied, at the same time preserving a channel for a pay TV program such as HBO, Cinemax, or Showtime which would not require a converter. Either the Grantee or the City may propose to change the basic program from time to time, particularly if a showing can be made that the existing basic program does not satisfy the greatest number of subscribers. The party initiating a proposed change shall give the other party notice a reasonable time in advance and the parties will negotiate whether the proposed change is necessary and if so with respect to the effective date of the basic program change, any change in the charge to subscribers, and the method of handling the notice of change to subscribers. On or before the effective date of any change in the basic program, Grantee shall provide the City with a schedule showing the existing basic program, the effective date of the change, and the new basic program, and each party shall make a copy of that schedule a part of this Agreement by attaching a copy hereto.

(5.2) The Grantee shall also provide at its expense all equipment and facilities necessary to provide subscribers with TV programs outside the basic program for which Grantee may charge reasonable additional subscription rates. The Grantee shall furnish the City a schedule showing what these Pay TV programs are and the monthly charge per tier of such programs. A copy shall be attached to this Agreement and made a part hereof. Such Pay TV program tiers may be changed by Grantee from

time to time, provided advance notice is given to subscribers by Grantee. On or before the effective date of such change, Grantee shall furnish the City a schedule showing the existing tiers of Pay TV, the effective date of change, and the new tiers, and such schedule shall become a part of this Agreement.

(5.3) The quality, both visual and aural, of the programs transmitted to subscribers by Grantee, shall meet FCC engineering standards and be essentially the same as if the subscriber were located in the normal viewing area of the original broadcast, subject only to such degradation as may be caused by the subscriber's TV set, the satellite relay or other equipment beyond the control and not the responsibility of Grantee. Grantee shall not be charged with default hereunder for failures caused by storms, lightning, earthquakes, and other force majeure events. However, Grantee shall use its best efforts to recover and restore service as soon as possible in case of disruption from such causes. Where subscribers are without service due to force majeure for more than 24 hours, they shall receive an automatic credit for the period during which they did not receive service, which credit will be redeemed at the end of their subscription. If such disruption is not caused by force majeure, the subscriber may claim a *pro rata* rebate at Grantee's local office.

(5.4) Grantee shall extend its lines and provide cable TV service to one or more residents of the City in any locality where the Grantee's normal scheduled charge for installation of the cable and/or other equipment necessary to add that resident (or those residents) to Grantee's system is 75% or more of Grantee's actual out-of-pocket cost of such installation. Grantee may terminate the subscription of a subscriber who willfully destroys Grantee property or who cheats Grantee (e.g., by installing unauthorized equipment, etc.) or who fails and refuses to pay proper charges after first having received due notice. In addition, Grantee may pursue such other remedies as may be permitted by law in such cases.

(5.5) Grantee shall maintain accurate books and records of its Paragould operation covered by this Agreement (i.e., not consolidated with a parent or affiliate) such that the Grantee on reasonable written notice, can (and Grantee agrees to do so) make available to a responsible representative of Grantor, the books and records of Grantee pertaining to cash receipts of Grantee's Paragould operation. If requested, Grantee shall cooperate with the said responsible representative of the Grantor in reconciling with its said books and records the franchise payment by the Grantee to the Grantor which corresponds to the period for which the Grantee's records are made available.

(5.6) Grantee shall maintain an office in the City, with a telephone, at which bills may be paid, services may be requested, records and accounts will be kept, and complaints may be registered. Grantee will respond promptly to requests for service and to service complaints. The term "service complaints" refers to complaints relating to faulty TV reception by subscribers. Other complaints will be promptly investigated by Grantee, and the complaining party notified of the result of such investigation.

(5.7) Grantee's schedule of service charges in effect on the effective date of this Agreement shall be attached hereto (referring to this paragraph) and made a part hereof. The schedule shall include the charge for the basic program, various tiers of pay TV, and any other charges to subscribers for cable TV service. The schedule shall include charges for all classes of subscribers (e.g., residential, motel, etc.). Grantee agrees to keep charges reasonable, and will provide the City 60 days notice of a proposed change in the schedule. If the City considers a proposed change in charges unreasonable (for example, if the change is an increase and it more than covers the increase of Grantee's cost of doing business, Grantor might consider the change "unreasonable") Grantee agrees to enter into discussions with City representatives at City's

request concerning such proposed changes and when requested in writing by Grantor to furnish reasonable details which Grantee relies upon to justify such charges.

(5.8) Grantee's schedule for installation charges in effect on the effective date of this Agreement shall be attached hereto (referring to this paragraph) and made a part hereof. The schedule shall include all categories of installation charges to each class of subscribers (e.g., residential, business, institution, etc.) Grantee agrees that such charges shall be reasonable in comparison with out of pocket costs, and will provide the City 30 days notice of a proposed change in the schedule. If the City considers a proposed change unreasonable, Grantee agrees to enter into discussions with City representatives at City's request concerning the proposed changes.

(5.9) Grantee agrees to give subscribers notice in advance of the effective date of any change in its service, installation or other charges. Notice in writing by mail is the preferred method, but Grantee may use other methods if they can be shown to provide reasonable advance notice to a substantial majority of subscribers.

(5.10) Grantee shall pay the City within 30 days after 31 August 1984 and within 30 days after 31 August thereafter while this Agreement is in effect a franchise fee of 3% of Grantee's gross receipts from the sale of cable TV service (basic and all pay TV). The first payment (as of 31 August 1984) shall cover the period from 10 December 1983 to 31 August 1984, inclusive, and the succeeding payments except the last shall cover the period from 1 September to 31 August inclusive. The last payment shall cover the period from the "as of" date of the late payment actually made to the date of expiration or other termination of this Agreement. Each payment shall be supported by a brief financial statement showing gross receipts from the sale of cable TV service for the payment period, the number of subscribers at the end of the period

and the number at the midpoint of the period. The supporting financial statement shall also show the amount of installation charges collected, and the amount if any paid by Grantee during the pay period to the City Light and Water System.

(5.11) The Grantee shall give the City advance written notice of at least 15 days if it decides to abandon its cable TV system and at least 30 days if it contemplates sale, assignment, subleasing or other disposition of its Cable TV service or control thereof.

(a) In case of abandonment, Grantee shall make all details pertinent to its facilities and equipment and other property serving the City, including the existence and status of any indebtedness, liens, etc., known to the City. Grantee shall also advise the City of its intentions pertaining to removal, salvage, cannibalization or other disposition of property (personal and real), and the City shall have the right to require Grantee to transfer to the City all of Grantee's property which Grantee intends to abandon in consideration of the City's agreement not to require Grantee to remove installed personal property. Additionally, the City shall have the right to require Grantee to transfer to the City all or any part of the property Grantee intends to remove, salvage, cannibalize or otherwise dispose of by means other than abandonment upon such terms and arrangements as may be negotiated between the parties or as may be determined by an informal arbitration board of three persons, one designated by Grantee, another by the City and a third selected by the two designees.

(b) In case of disposition by means other than by abandonment, Grantee agrees to give the City the right of first refusal, and shall make known to the City all details of the proposed transaction with the third party. If the City should decide to acquire Grantee's cable TV system, or control thereof, pursuant to its right of first refusal,

Grantee agrees to provide City with at least 15 days instruction into the complete operation of the system and to assist the City in a smooth transition, without charge to the City. If the City does not decide to undertake such acquisition, Grantee shall not consummate the transfer to a third party without first giving the City an opportunity to assure itself of the competence and ability of the third party to operate the system. The City's acquiescence shall be in writing and may contain provisions binding on Grantee to guarantee performance by such third party. Such guarantee may at Grantee's option, take the form of an appropriate performance bond in an amount of not less than $100,000.00.

(5.12) Matters presented to Grantee through the Mayor's office as a result of the complaint procedure set forth in paragraph 6 below shall receive prompt attention by Grantee and Grantee shall respond thereto in writing within 10 days after receipt. If such response does not resolve the matter, the City may call for negotiation, and if either party does not consider that the negotiations have provided a satisfactory solution, the matter (or portions thereof) may be referred to informal arbitration for resolution, one arbitrator to be selected by Grantee, one by City and the third by the two selectees.

6. City's Operating Responsibilities

(6.1) The Mayor's office shall establish a Complaint Committee composed of two City officials and one of Grantee's subscribers (three individuals) to consider complaints pertaining to Grantee's cable TV System, its operation, service, charges, etc. Such complaints may be lodged with the City Clerk and will be referred to the Complaint Committee promptly by the City Clerk. The Committee may act on the complaint as filed, and in any event will refer it to Grantee if the complaining party has not previously given Grantee a chance to resolve the matter. The Committee may request the complaining

party (parties) to come to a Committee meeting and furnish additional details. The Committee may invite a representative of Grantee to participate in the information-gathering phase of any complaint. The Committee shall work informally with Grantee's representatives to try to resolve a complaint, but may also refer the matter in writing and in reasonable detail to the Mayor's office for formal presentation to the Grantee.

(6.2) The Mayor shall designate one or more members of the City Council to function as a committee to oversee (called the TV Oversight Committee) the administration of this Agreement. The Mayor shall designate the City Clerk to administer this Agreement on behalf of the City. Such administration shall include the keeping of the official copy of this Agreement, including all amendments, to receive and give all written notices hereunder, to keep track of all dates, deadlines, etc. herein provided for and to advise the Oversight Committee and the Mayor of Notices received from Grantee, of approaching deadlines, events, etc. which may require action hereunder.

7. Compliance with Applicable Laws and Regulations

(7.1) Grantee shall advise the City promptly if compliance with any law or regulation, in Grantee's opinion, affects this Agreement and in such advice shall identify the law or regulation (furnishing a copy if possible) and shall describe the portions Grantee believes will be (or are) affected. After a reasonable time for consideration by the City, the matter shall be resolved by discussions between the parties and, if required, by written modification of this Agreement.

(7.2) The performance by the Grantee hereunder is subject to limitations, restrictions, or requirements now existing or which may henceforth be imposed by law, rules or order of the F.C.C. or of any other government board, commission or agency in the proper exercise of public authority. The Grantee shall not be deemed in

breach of any of the requirements of this Agreement to the extent it performs in accordance with, or refrains from doing anything prohibited by, such law, rule or order.

(7.3) Should the F.C.C. modify or amend the provisions of 76.31 of its Rules and Regulations entitled "Franchise Standards," such modifications or amendments shall be incorporated into this Franchise Agreement when required by the F.C.C. Rules and Regulations or at the time of the exercise of an option by the Grantee for extension of the Agreement, whichever first occurs.

8. Disputes

(8.1) If a dispute should arise under this agreement which cannot be settled by negotiation between the authorized representatives of the parties, either party may notify the other in writing that the matter shall be referred to arbitration. The initiating party will select one arbiter for whose compensation that party will be responsible. This selection will be made known to the other in the initial notification. The recipient of the original notice shall nominate a second arbiter for whose compensation that party will be responsible and will notify in writing the other party of this selection within five business days. After both arbiters have been selected, they shall have ten business days to select a third arbiter whose compensation shall be divided equally between the parties. The three arbiters shall constitute an arbitration board for resolution of the dispute. The arbitration board shall ask each party for its version of the dispute and germane facts. Each party shall have ten days within which to provide in writing its version of the facts, and its position in the dispute. The arbitration board may conduct its own investigation in which event each party is bound to fully cooperate in the investigation. The arbitration board shall announce its decision in the dispute as expeditiously as is reasonably possible. With the exception of disputes in-

volving the fair and reasonable charges hereunder, the parties shall be bound by the decision of the arbitration board. With regard to any dispute involving the issue of fair and reasonable charges, the decision of the arbitration board shall constitute nonbinding arbitration.

IN WITNESS WHEREOF, the parties hereunto have caused this agreement to be duly executed this 28th day of November, 1983.

/s/ William C. Henchy
W. C. HENCHY
President
Paragould Cablevision

ATTEST:

/s/ Kenneth F. Burnes
Secretary

Seal

/s/ Charles R. Partlow
CHARLES R. PARTLOW
Mayor
Paragould, Arkansas

ATTEST:

/s/ Goldie Wise
City Clerk

Seal

RESOLUTION NO. 83-22

RESOLUTION AUTHORIZING THE MAYOR AND THE CITY CLERK TO EXECUTE CERTAIN CABLE TV FRANCHISE AGREEMENT WITH PARAGOULD CABLEVISION, INC.

WHEREAS, the present Ordinance governing the Cable TV franchise in favor of Paragould Cablevision, Inc. will expire on December 10, 1983; and,

WHEREAS, the City Council desires to continue Cable TV services within the City of Paragould, Arkansas.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL FOR THE CITY OF PARAGOULD, ARKANSAS, as follows:

SECTION I: That the City Council has considered the Cable TV Franchise Agreement recommended to the City of Paragould, Arkansas, by the Cable TV Committee comprised of Don Perky, Fred Wulfekuhler and Phil Herget. The Council finds the proposed Agreement to be acceptable and hereby directs and authorizes the Mayor of the City of Paragould, Arkansas, to execute on behalf of the City the Cable TV Franchise Agreement which is attached hereto and incorporated by reference herein as if set out word for word.

SECTION II: That the Mayor is hereby directed to take appropriate steps to transmit the executed copy of the Franchise Agreement to Paragould Cablevision, Inc. for execution.

PASSED AND APPROVED this 28th day of November, 1983.

CITY OF PARAGOULD,
ARKANSAS

By: /s/ Charles R. Partlow
Mayor

ATTEST:

/s/ Goldie Wise
City Clerk

PARAGOULD CABLEVISION, INC.

CLERK'S CERTIFICATE

The undersigned, Kenneth F. Burnes, hereby certifies that he is the duly elected and acting Clerk of Paragould Cablevision, Inc., that the following resolutions were duly adopted by the Board of Directors of Paragould Cablevision, Inc. by a Unanimous Written-Consent dated December 28th, 1983 and that such resolutions have not been amended or rescinded and remain in full force and effect:

RESOLVED:

That this Corporation renew its cable franchise for Paragould, Arkansas and that William C. Henchy, President of this Corporation, is hereby authorized to execute and deliver on behalf of this Corporation a renewal of franchise agreement with the appropriate cable authority upon terms and conditions satisfactory to the executing officer, the signature of Mr. Hench thereon to be conclusive evidence of the approval thereof by this Board as so executed.

FURTHER RESOLVED:

That in connection with the renewal of the cable franchise with Paragould, Arkansas, any officer of this Corporation be and each acting singly is hereby authorized to execute and deliver on behalf of this Corporation such other documents and take such other action as any of them shall determine to be necessary or desirable.

Witness my hand and the seal of Paragould Cablevision, Inc. this 28th day of December, 1983.

/s/ Kenneth F. Burnes
Clerk

CABLE TELEVISION FRANCHISE AGREEMENT

WHEREAS, Paragould Light and Water Commission (hereinafter the "Commission" or "Grantee"), a light and water commission created by the City of Paragould, Arkansas pursuant to the laws of the State of Arkansas, desires to construct a broadband communications system within the limits of the City of Paragould, which system would be used to provide both utility related communications and cable television services;

WHEREAS, by referendum conducted on June 17, 1986, the public approved Ordinance 86-3 (hereinafter "Ordinance") authorizing the construction and operation of a cable television system by the Commission;

WHEREAS, by Resolution No. 88-10 of June 6, 1988 the City Council of the City of Paragould directed the Commission to undertake the necessary steps toward the construction and operation of a cable system;

WHEREAS, the Mayor of the City of Paragould, Arkansas, has been authorized by Resolution No. 89-1, to enter into this Agreement with the Commission.

NOW THEREFORE, the City of Paragould (hereinafter the "City" or "Grantor") and the Commission agree as follows:

1. Grant of Franchise

(1.1) Subject to compliance by Grantee with its obligations under the Ordinance and this Agreement, the Grantor hereby grants to the Grantee a non-exclusive franchise to install and operate a broadband cable communications system throughout the entire City, including during the term hereof any areas now outside the City which may be subsequently annexed, and to provide cable service within the authorized area. This franchise includes the right to install cable and other system hardware in, upon, along, over and under the City's streets,

avenues and other public rights-of-way, subject to the provisions of this Agreement. To the extent otherwise permitted by law, Grantee may extend its cable communications system beyond the City boundaries.

(1.11) Grantee shall utilize existing light, power, or telephone poles whenever economically and technically feasible.

(1.12) Before the Grantee erects any new poles or makes any other installation upon City owned or controlled property, the Grantee shall obtain a permit from the City Inspector and shall coordinate the work with any utility whose lines may be affected. Any pavements, sidewalks, curbing, or other installed improvement taken up and any and all excavations made by Grantee shall be done in such manner as to give the least inconvenience to the inhabitants of the City and the public generally. The work shall be completed with all convenient speed and the premises restored to at least the condition existing before the work was undertaken, all at the expense of the Grantee. The Grantee shall retain complete records and make "as installed" maps showing the location of its facilities in the City, with a copy of the maps furnished to the City. The Grantee shall not place poles or other fixtures where they will interfere with existing utility lines and installations.

2. Effective Date, Term and Renewal

(2.1) This Agreement shall take effect on January 16, 1989 and shall continue in full force and effect for a period of fifteen (15) years thereafter; provided, however, there shall be a review of the terms hereof and of the Grantee's performance hereunder at the end of the first five year period. Such review shall determine whether:

(a) Grantee's charges to subscribers are sufficient to cover its costs pursuant to Section 5.1 hereof;

(b) Grantee is providing cable service to all residents of the City who desire such service;

(c) The nature and/or quality of Grantee's service is adequate if a substantial number of credible complaints relating hereto have been received;

(d) The Grantee's handling of complaints, changes, or charges or other interfaces with subscribers is satisfactory; and

(e) The City has complied with the terms of this Agreement in a timely, businesslike manner.

As a result of such review, the above matters may become subject to negotiation and any problems subject to resolution by agreement incorporated herein by written amendment.

(2.2) This Agreement is subject to the requirements of the Ordinance and the Cable Communications Act of 1984, 47 U.S.C. § 521 *et seq.* ("Cable Act"), and covers the provision of "cable service" as that term is defined in the Cable Act. This Agreement does not preclude Grantee's use of its broadband system for the provision of non-cable services over its broadband facility, provided that such use is consistent with state and federal law and related rules and regulations.

3. Indemnification and Insurance

(3.1) Grantee shall indemnify and save the City harmless from all loses sustained by the City on account of any claim or demand, whether litigated or not, arising out of the operation and maintenance of Grantee's system covered by this Agreement. Grantor shall notify the Grantee promptly but in no event later than 30 days after the presentation of any claim or demand made against the Grantor which is indemnified hereinafter. The indemnification provided by the Grantee hereunder shall include reasonable attorney's fees.

(3.2) Grantee shall carry liability insurance relative to its cable television business covering property damage in an amount not less than $500,000 and covering personal injury in an amount not less than $1,000,000 as to any one person, and not less than $3,000,000 as to any one accident. Such coverage shall apply to all of Grantee's operations including its vehicles, and shall be written by a reputable insurance company authorized to do business in the State of Arkansas. Grantee shall keep on file with the City Clerk a certificate showing that such coverage has been obtained and is current. If Grantee employs contractors or subcontractors, it shall require adequate liability insurance to be carried by them during their employment by Grantee. Certificates furnished to the City Clerk shall include a statement from the insurer that in event of cancellation or other termination, the insurer shall promptly notify the City Clerk in writing.

4. Miscellaneous Provisions

(4.1) The City understands that Grantee will promulgate reasonable rules and regulations applicable to its subscribers which are necessary to enable Grantee to exercise its rights and perform its services under this franchise and to provide uninterrupted service to its customers.

(4.2) Grantee recognizes that the City has the right of reasonable regulation of the erection, construction and/or installation of facilities by Grantee, including regulation of the location of such facilities of Grantee to be placed on property belonging to or under the control of the City.

(4.3) Grantee shall, upon the request of any person holding a permit from the City for moving a building or other outsize load, temporarily raise or lower its wires to permit the passage of the load, provided the Grantee is given no less than 48 hours notice to arrange for such passage. The expense of such arrangement shall be borne by the party moving the outsize load, and the Grantee may request payment in advance.

(4.4) The Grantee shall have authority to trim trees which overhang streets, sidewalks and other public ways when such trimming is necessary to prevent interference with Grantee's wires and cables. Such trimming shall be subject to the supervision of an authorized representative of the City, but at Grantee's expense.

(4.5) If, during the time this Agreement is in effect, the City lawfully alters any street, sidewalk or other public way such that Grantee's poles, wires or other fixtures and equipment are affected, the Grantee, upon reasonable notice from the City, shall make such adjustments in its poles, wires or other fixtures and equipment as may be necessary (including but not limited to removal and relocation) at Grantee's expense.

(4.6) Nothing in this Agreement shall exempt or exclude Grantee from application of the City's police power or from the application of lawful City ordinances.

(4.7) The terms used herein shall be defined consistent with the use of those terms in the Cable Act and, if not so used, as those terms are ordinarily used in the context of cable television service.

5. Operation and Maintenance of the Cable TV System

(5.1) To provide cable service hereunder, Grantee shall establish a new department which shall have as its sole function the provision of cable service. The cable department shall maintain its own separate books of account and shall share common costs with Grantee's utility operations on a reasonably allocated basis so as to ensure that the costs of providing cable service are not subsidized by utility rate payers. The cable department may lease capacity from Grantee's broadband communications system provided that the cable department pays its reasonably allocated share of such system's total cost. If the cable department performs installation and/or maintenance services relative to the broadband system which is

used for both cable services and other communications services, such installation or maintenance services shall be covered by contract negotiated on "arm's length" basis and shall reflect a reasonable allocation of costs as between cable service related costs and other costs.

(5.2) Grantee shall provide to its cable subscribers a basic service of not less than eleven (11) channels. All cable programming carried shall be selected by the Citizen's Cable Television Advisory Committee ("Committee") as established pursuant to Section 6 of the Ordinance. Grantee shall have the authority to establish the number and type of channels to be carried and reasonable cost limits applicable thereto.

(5.3) Grantee shall have the authority to provide subscribers with services in addition to basic service. All programming services shall be selected by the Committee as provided in Section 5.2.

(5.4) The quality, both visual and aural, of cable service shall meet minimum Federal Communications Commission ("FCC") recommended technical standards and be essentially the same as if the subscriber were located in the normal viewing area of the original broadcast, subject only to such degradation as may be caused by the subscriber's TV set, satellite relay or other facilities beyond the control and not the responsibility of Grantee. Grantee shall not be charged with default hereunder for failures caused by storms, lighting, earthquakes, and other force majeure events. However, Grantee shall use its best efforts to recover and restore service as soon as possible in case of disruption from such causes. Where subscribers are without service due to force majeure events for more than 24 hours, they shall receive an automatic credit for the period during which they did not receive service, which credit will be redeemed at the end of their subscription. If such disruption is not caused by force majeure, the subscriber may claim a *pro rata* rebate at Grantee's local office.

(5.5) Grantee shall extend its lines and provide cable service to one or more residents of the City in any locality where the Grantee's normal schedule charge for installation of the cable and/or other equipment necessary to add that resident (or those residents) to Grantee's system is seventy-five percent (75%) or more of Grantee's actual out-of-pocket cost of such installation. Grantee may terminate the subscription of a subscriber who willfully destroys Grantee property or who defrauds or attempts to defraud Grantee (*e.g.*, by installing unauthorized equipment, etc.) or who fails and refuses to pay proper charges after first having received due notice. In addition, Grantee may pursue such other remedies as may be permitted by law in such case.

(5.6) Grantee shall maintain accurate books and records of its cable operations covered by this Agreement, and Grantee agrees to make available such books and records relative to its cable operation to a responsible representative of Grantor upon request. If requested, Grantee shall cooperate with the said representative in reconciling said books and records with the franchise payment made by the Grantee and the requirements of this Agreement.

(5.7) Grantee shall maintain a cable office in the City, with a telephone, at which bills may be paid, services may be requested, records and accounts will be kept, and complaints may be registered. Grantee will respond promptly to requests for service and to service complaints. The term "service complaints" refers to complaints relating to faulty cable reception by subscribers. Other complaints will be promptly investigated by Grantee, and the complaining party notified of the result of such investigation.

(5.8) Grantee agrees to give subscribers notice in advance of the effective date of any change in its service, installation or other charges. Notice in writing by mail is the preferred method, but Grantee may use other meth-

ods if they can be shown to provide advance notice to a substantial majority of subscribers.

(5.9) Grantee shall pay the City within 30 days of 31 August 1989 and within 30 days after each 31 August thereafter while this Agreement is in effect a franchise fee of three percent (3%) of Grantee's gross receipts from the sale of cable service (basic service and all other pay tiers) within the City. The first payment (as of 31 August 1989) shall cover the period from the date of this Agreement to 31 August 1989, inclusive, and the succeeding payments except the last shall cover the period from 1 September to 31 August inclusive. The last payment shall cover the period from the "as of" date of the last payment actually made to the date of expiration or other termination of this Agreemnt. Each payment shall be supported by a brief financial statement showing gross receipts from the sale of cable service for the payment period, the number of subscribers at the end of the period and the number at the midpoint of the period. The supporting financial statement shall also show the amount of installation charges collected.

(5.10) The Grantee shall give the City advance written notice of at least 15 days if it decides to abandon its broadband system and at least 10 days if it contemplates sale, assignment, subleasing or other disposition of its cable service or control thereof.

(a) In case of abandonment, Grantee shall make all details pertinent to its facilities and equipment and other property serving the City, including the existence and status of any indebtedness, liens, etc., known to the City. Grantee shall also advise the City of its intentions pertaining to removal, salvage, cannibalization or other disposition of its cable facility other than for the disposition of depreciated, obsolete or other property disposed of in the ordinary course of business, and the City shall have the right to require Grantee to transfer to the City all such property which Grantee intends to abandon in consideration of the City's agreement not to require Grantee

to remove installed personal property. Additionally, the City shall have the right to require Grantee to transfer to the City all or part of any such property Grantee intends to remove, salvage, cannibalize or otherwise dispose of by means other than abandonment upon such terms and arrangements as may be negotiated between the parties or as may be determined by an informal arbitration board of three persons, one designated by Grantee, another by the City and a third selected by the two designees.

(b) In case of disposition of its cable facility by means other than by abandonment, Grantee agrees to give the City the right of first refusal, and shall make known to the City all details of the proposed transaction with the third party. If the City should decide to acquire Grantee's cable facility pursuant to its right of first refusal, Grantee agrees to provide City with at least 15 days instruction on the operation of the system and to assist the City in a smooth transition, without charge to the City. If the City does not decide to undertake such acquisition, Grantee shall not consummate the transfer to a third party without first giving the City an opportunity to assure itself of the competence and ability of the third party to operate the system. The City's acquiescence shall be in writing and may contain provisions binding on Grantee to guarantee performance by such third party. Such guarantee may at Grantee's option, take the form of an appropriate performance bond in an amount not less than $100,000.00.

(5.11) Grantee shall establish its internal procedures for dealing with subscriber complaints. However, subscribers shall have the right to present complaints to the City as provided for in Section 6.1. Matters presented to Grantee through the Mayor's office as a result of the complaint procedure set forth in paragraph 6 below shall receive prompt attention by Grantee and Grantee shall respond thereto in writing within 10 days after receipt.

If such response does not resolve the matter, the City may call for negotiation, and if either party does not consider that the negotiations have provided a satisfactory solution, the matter (or portions thereof) may be referred to informal arbitration for resolution, one arbitrator to be selected by Grantee, one by City and the third by the two selectees.

6. City's Responsibilities

(6.1) The Mayor's office shall establish a Complaint Committee composed of two City officials and one of Grantee's subscribers (three individuals) to consider complaints pertaining to Grantee's cable service, its operation, charges, etc. Complaints may be lodged with the City Clerk and will be referred to the Complaint Committee promptly by the City Clerk. The Committee may act on the complaint as filed, but will refer it to Grantee if the complaining party has not previously given Grantee a chance to resolve the matter. The Committee may request a complaining party to furnish additional details. The Committee may invite a representative of Grantee to participate in the formation-gathering phase of any complaint. The Committee shall work informally with Grantee's representatives to try to resolve a complaint, but may also refer the matter in writing and in reasonable detail to the Mayor's office for formal presentation to the Grantee.

(6.2) The Mayor shall designate one or more members of the City Council to function as a committe to oversee (called the TV Oversight Committee) the administration of this Agreement. The Mayor shall designate the City Clerk to administer this Agreement on behalf of the City. Such administration shall include the keeping of the official copy of this Agreement, including all amendments, to receive and give all written notices hereunder, to monitor all dates, deadlines, etc. herein provided for and to advise the oversight Committee and the Mayor of Notices

received from Grantee, of approaching deadlines, events, etc. which may require action hereunder.

7. Compliance with Applicable Laws and Regulations

(7.1) Grantee shall advise the City promptly if compliance with any law or regulation, in Grantee's opinion, affects this Agreement and in such advice shall identify the law or regulation (furnishing a copy if possible) and shall describe the portions Grantee believes will be (or are) affected. After a reasonable time for consideration by the City, the matter shall be resolved by discussions between the parties and, if required, by written modification of this Agreement.

(7.2) The performance by the Grantee hereunder is subject to limitations, restrictions, or requirements now existing or which may henceforth be imposed by law, rules or order of the FCC or of any other government board, commission or agency in the proper exercise of authority. The Grantee shall not be deemed in breach of any of the requirements of this Agreement to the extent it performs in accordance with, or refrains from doing anything prohibited by, such law, rule or order.

(7.3) Should the Congress amend the Cable Act or the FCC its rules and such amendment requires modification of this Agreement to come into compliance therewith, the parties shall negotiate and execute an appropriate amendment to this Agreement.

8. Disputes

(8.1) If a dispute should arise under this Agreement which cannot be settled by negotiation between the parties, either party may notify the other in writing that the matter shall be referred to arbitration, in such notification nominating one arbiter. Within five (5) business days the recipient of such notice shall nominate a second arbiter, advising the other party in writing. Within 10 days the two arbiters shall select a third, and the three

shall constitute an arbitration board for resolution of the dispute. The board shall ask each party for its version of the dispute and the germane facts, and the board may conduct its own investigation in which each party is bound to cooperate. The board shall announce its decision in the dispute with all due dispatch and the parties shall be bound thereby to the extent that such decision does not violate any law or lawful regulation and to the extent it is within the municipal authority of the City.